FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 46

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

DEENA ARTWARE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1959
CERTIORARI GRANTED MAY 4, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 46

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

DEENA ARTWARE, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Sixth Circuit	1	1
Order enforcing NLRB order as modified in the opinion	1	1
Supplemental decree	2	2
Petition for adjudication in civil contempt and for other civil relief	4	3
Order to show cause	18	13
Motion and answer of respondent, Deena Artware, Inc.	20	15
Motion and answer of George H. Weiner	44	31
Motion and answer of Deena Products Company, an Illinois Corporation	45	31
Motion and answer of Deena of Arlington	46	32
Motion an answer of Sippi Products Company	47	32
Motion and answer of Industrial Realty Company	48	33
Motion for discovery and inspection and depositions upon oral examination	49	34
Affidavit of Thomas J. McDermott	60	42
Response to motion for discovery of October 9, 1958	68	48
Memorandum of respondent on motion of October 9, 1958 for discovery	76	53
Minute entry of argument and submission (omitted in printing)	84	

	Original	Print
Supplemental memorandum in opposition to motion to dismiss the petition for contempt adjudication and in support of motion for discovery and inspection and depositions upon oral examination	85	59
Memorandum for respondent in response to supplemental memorandum of petitioner	95	68
Order denying the Board's motion for discovery and inspection and depositions upon oral examination and sustaining the motions of the respondents to dismiss the Board's petition for adjudication in civil contempt	103	73
Opinion, Miller, J.	104	74
Clerk's certificate (omitted in printing)	115	
Respondent's Exhibit A-3—Amended and substituted complaint filed December 11, 1950 in the District Court of the United States for the Western District of Kentucky (Civil Action No. 477)	116	85
Respondent's Exhibit A-4—Judgment, dated December 15, 1950 of the District Court of the United States for the Western District of Kentucky at Paducah (Civil Action No. 477)	122	91
Order extending time to file petition for writ of certiorari in United States Supreme Court	123	92
Order allowing certiorari	124	92

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

DEENA ARTWARE, INCORPORATED, Respondent

Before Simons, Chief Judge; Martin and Miller, Circuit Judges

ORDER ENFORCING NLRB ORDER AS MODIFIED IN THE OPINION —Filed July 30, 1952

On petition to enforce an order of the National Labor Relations Board,

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court that the order of the National Labor Relations Board be and the same is enforced as modified in the opinion herein.

Approved for entry:

Shackelford Miller, Jr., United States Circuit Judge.

[fol. 2] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

DEENA ARTWARE, INCORPORATED, Respondent

Before Martin, Miller and Stewart, Circuit Judges

SUPPLEMENTAL DECREE—Filed December 16, 1955

This Court having on July 30, 1952, handed down its decision enforcing an order of the National Labor Relations Board, which directed, among other things, that the respondent, Deena Artware, Incorporated, Paducah, Kentucky, its officers, agents, successors and assigns make whole certain named employees for loss of pay suffered by reason of unlawful discrimination against them; and the Board having then held a further hearing and having issued its Supplemental Decision and Order; and the Board having thereafter moved this Court for the entry of a supplemental decree specifying the amounts of back pay due said employees;

And the Court being of the opinion that jurisdiction to grant said motion and to enter this supplemental decree is conferred by Sec. 160(e), Title 29, U. S. Code; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 US 177, 197-200; *N.L.R.B.* v. *Cambria Clay Products Co.*, 215 F. (2d) 48, 56, C.A. 6th; *Marlin-Rockwell Corp.* v. *N.L.R.B.*, 133 F. (2d) 258, 260, C.A. 2nd; *Home Beneficial Life Ins. Co.* v. *N.L.R.B.*, 172 F. (2d), 62, C.A. 4th;

And that the findings of the Board are supported by substantial evidence on the record considered as a whole, and that the formula, used by the Board in computing [fol. 3] the amount of back pay was within the discretionary power of the Board, was not arbitrary, and bears an appropriate relation to the policies of the Act; *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344; *Phelps Dodge Corp.*

v. *N.L.R.B.*, supra; *Marlin-Rockwell Corp.* v. *N.L.R.B.*, supra, p. 260;

It is Hereby Ordered, Adjudged and Decreed that the Respondent, Deena Artware, Incorporated, Paducah, Kentucky, its officers, agents, successors, and assigns, shall:

(a) Pay to the employees named in the Appendix attached hereto, who were found to have been discriminated against by a Board Decision and Order issued October 25, 1949, as enforced by this Court, net back pay in the amounts set out in the Appendix.

Approved for entry:

s Shackelford Miller, Jr., United States Circuit Judge.

[fol. 4] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF—Filed August 20, 1958

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

Comes now the National Labor Relations Board (herein called the Board) and respectfully petitions this Court to adjudge respondent Deena Artware, Incorporated, its president and agent George H. Weiner, and Deena Products Co., Inc., Deena of Arlington, Inc., Sippi Products Co., Inc., and Industrial Realty Co., Inc., and each of them, in civil contempt of this Court for resisting, violating and disobeying, and failing and refusing to comply with, and continuing to resist, violate and disobey, and fail and refuse to comply with, the decree of this Court entered herein on July 30, 1952, and the supplemental decree entered herein on December 16, 1955, and for other civil relief.

In support of its petition, the Board, upon information and belief, alleges as follows:

I. On July 30, 1952, this Court entered its decree herein enforcing an order of the Board issued on October 25, 1949, against respondent Deena Artware, Incorporated [fol. 5] (herein called Artware), said decree directing, *inter alia*, that Artware, its officers, agents, successors and assigns, make whole certain named employees for any losses in pay they may have suffered by reason of respondent's discrimination against them in violation of the National Labor Relations Act, as amended. On March 9, 1953, the United States Supreme Court denied respondent's petition for certiorari. Thereafter, on April 21, 1955, that Board issued a supplemental order fixing the specific amounts due each of 56 named employees pursuant to said decree, totaling approximately $300,000. On December 16, 1955, this Court entered its supplemental decree herein enforcing the Board's said supplemental order and directing Artware, its officers, agents, successors and assigns, to pay the money due to said employees.

II. As is more fully set forth in paragraph V, *infra*, at all times material herein, Deena Products Co., Inc. (herein called Products), an Illinois corporation maintaining plants and its principal office at Chicago, Illinois, has owned, except for the minimum shares required by directors to qualify for office, all of the shares of stock of respondent Artware and Deena of Arlington, Inc., Sippi Products Co., Inc. and Industrial Realty Co., Inc. (herein respectively called Arlington, Sippi and Industrial, and with Artware sometimes herein collectively called the subsidiaries). As is more fully set forth below, by virtue of their common ownership and direction and the nature of their financial structure and method of their operations, the subsidiaries, including Artware, have been the adjuncts, agents and instrumentalities of Products, and Products, Arlington, Sippi and Industrial have been *alter egos* of, and successors to, Artware, and by virtue of the nature and operation of the common enterprise, Products, Arlington, Sippi and Industrial have been agents of Artware, all within the meaning and subject to the pertinent directives, of the decrees herein.

[fol. 6] III. As is more fully set forth in paragraph V, *infra*, at all times material herein, George H. Wegner

(herein called Weiner) has been president and agent of Artware and has owned, controlled and directed Products and its said subsidiaries, including Artware, and has been an *alter ego* and successor to Artware within the meaning of, and subject to, the said decrees, and responsible and liable for the disobedience of, and failure to comply with, said decrees of this Court.

IV. The said decree and supplemental decree of this Court have been in full force and effect since their entry, and at all times material herein Artware, Products, Arlington, Sippi, Industrial and Weiner have had notice and actual knowledge of the terms thereof.

V. Artware, Products, Arlington, Sippi, Industrial and Weiner have resisted, violated and disobeyed, and failed and refused to comply with, and continue to resist, violate and disobey, and fail and refuse to comply with, the said decree and supplemental decree of this Court in that, at all times since entry thereof, Artware, its president and agent Weiner, and Products, Arlington, Sippi, and Industrial have failed and refused, and continue to fail and refuse, to pay to the employees named in said decrees, or any of them, the sums of money specified in said supplemental decree, or any part thereof, and the said Products, Arlington, Sippi and Industrial have actively concerted, participated and colluded with Artware in such failure and refusal. More particularly, the Board shows this Court as follows:

1. At all times material herein, Weiner has owned all the shares of stock of Products except for the minimum shares required by directors to qualify for office, and Products has owned all the shares of stock of its said subsidiaries, including Artware, except for the minimum shares required by directors to qualify for office, and thereby Weiner has been the real owner of Products and the subsidiaries.

[fol. 7] 2. At all times material herein, the officers and directors of Products and of the subsidiaries, including Artware, have been Weiner, his wife, his son, and whoever has been employed as Weiner's personal office secretary; and at all times material herein, Weiner has been president and treasurer of Products and of each of the subsidiaries, including Artware.

3. At all times material herein, Weiner has actively directed and controlled the financial and business operations of Products and the subsidiaries, including Artware.

4. At all times material herein, Products and the subsidiaries have constituted and have been operated as a single enterprise engaged in the manufacture, sale and distribution of lamps, with each of said corporations performing a particular function, as a department or division of the one enterprise in the manufacture, sale and distribution of the common product. In support hereof, the Board shows this Court as follows:

(a) Weiner and Products organized, incorporated and operated Artware, Arlington and Sippi with insufficient capital so as to require them, and in consequence of which they have been required, to secure frequent advances of money and credit from Products in order to conduct operations.

(b) Artware and Sippi were organized to acquire pottery plants in Kentucky, at Paducah and Wickliffe, respectively, and to manufacture urns for use as lamp bases. Arlington was organized to operate a plant at Arlington, Kentucky, for the assembly and manufacture of completed lamps. At all times material herein, the entire output of Artware, Arlington and Sippi has been sold to Products, the urns manufactured by Artware and Sippi being shipped either to Arlington for assembly into the lamps to be sold by Products or directly to Products for such assembly and sale.

[fol. 8] (c) Weiner and Products organized and operated Artware and the other subsidiaries and retained ownership of stock therein not for the purpose of investment or dividends or to promote the business of such subsidiary corporations individually but to dominate and control the subsidiaries to serve the purposes of Products and Weiner exclusively, as adjuncts, agents and instrumentalities of Products. Products has maintained management and overall supervision of the plants of the subsidiaries; fixed the extent of production by Artware, Arlington and Sippi; fixed the prices to be received by each of the subsidiaries for its products; provided the subsidaries with their raw materials and supplies upon requisition; caused transfer-

to be freely made of materials, services and use of facilities from one subsidiary to another without adequate consideration or value in exchange therefor; required the subsidiaries to submit regularly full and complete reports of their operations; maintained the books and records of the subsidiaries at Products' Chicago offices; paid the obligations of the subsidiaries with Products' own checks, and sometimes included payment of Products' individual obligations in the same checks; managed and controlled the funds and bank accounts of the subsidiaries; commingled the funds and property of the subsidiaries with those of Products; and represented to Products' customers and creditors, and to the public in general, that the subsidiaries and their plants were integral parts of Products. Its financial statements regularly furnished credit agencies and creditors were consolidated statements showing the condition of the single enterprise. Products received no dividends or other monetary return on its stock holdings in the subsidiaries. Further, Products and Weiner caused respondent Artware to deliver various materials, perform services and grant the use of its facilities, plant and per- [fol. 9] sonnel to Products, Arlington and Sippi without proper consideration or value therefor. Industrial was organized, after Artware ceased operations, to take title to the real estate, plant, machinery, equipment and fixtures formerly occupied and utilized by Artware at Paducah and to lease the same to Sippi.

5. Products and Weiner, through and together with Arlington, Sippi and Industrial, have caused the affairs and business of Artware to be conducted in a manner which did and was calculated to divest Artware of its assets during the litigation herein for the purposes of preventing and frustrating compliance with the Court's decrees. More particularly:

(a) About and after March 1949, following the hearings on the Board complaint herein, Products and Weiner, in the exercise of their control over the price which Products paid Artware for the urns which Artware manufactured and sold exclusively to Products, reduced such price despite added operations and increased costs, and required Artware to continue to sell and deliver its entire output to Products and or Arlington at prices which did not con-

stitute adequate or proper consideration or value for such products or permit Artware to show a fair return. In consequence thereof, Artware showed losses from its operations although Products made substantial profits on the sale of the completed product.

(b) About December 1947, Products commenced construction of a new factory building at Paducah, Kentucky, adjacent to Artware's plant, with the intention of performing therein the manufacturing and assembly operations then being performed by Products at its Chicago factories, and shipping the completed products from said new factory directly to the trade. Subsequently, about July 1948, it abandoned such construction in favor of a [fol. 10] new plant at Arlington, Kentucky, for the same purpose. Although the abandoned Paducah construction had been intended to be used by and for the purpose of Products and not by, for the use of, or in the name of Artware, nevertheless, following May 1948 when the unfair labor practices found by the Board were committed, Products and Weiner charged Artware with the costs of such construction and caused Artware to pay same and to reimburse Products for costs and expenses incurred and paid by Products for services and materials furnished for or used in such construction.

(c) Following the abandonment of the construction of the new plant at Paducah as foresaid, Products, about July 1948, arranged for the construction of a similar plant at Arlington, Kentucky, using substantially the same plans and specifications, and caused the building materials then on the abandoned Paducah construction site, which had been paid for by or charged to Artware, as aforesaid, to be shipped to the Arlington construction site for use in the new plant. Shortly thereafter, Products and Weiner caused Arlington, a Kentucky corporation, to be organized to complete and operate the said new Arlington, Kentucky, plant, using the construction materials, engineering and architectural plans and services, and other services and materials which had been previously charged to or paid for with the moneys of Artware as aforesaid, but without paying to Artware any proper compensation therefor or crediting Artware with the value thereof.

(d) On or about October 31, 1949, a few days after issuance of the Board's decision and order herein of October 25, 1949, directing, *inter alia*, that Artware make the employees involved whole for losses in pay sustained as a result of the discrimination against them, Products and Weiner caused Artware to execute mortgages on all of its [fol. 11] real and personal property, including its factory and other real estate, its equipment, machinery, fixtures and all other contents of its plant, and all subsequently acquired property of like nature, allegedly to secure the payment of a promissory note, executed at the same time, undertaking to pay Products $75,459.65 within 5 years from the date thereof, with interest at 6 percent payable semi-annually. Said note allegedly was given for advances for construction costs, building materials and architectural and engineering services in connection with the new Paducah plant described above in subparagraph (b), construction of which had long theretofore been abandoned. On or about September 19, 1952, shortly after entry of the decree herein on July 30, 1952, Products and Weiner caused Artware to execute further mortgages on said real and personal property, allegedly to secure payment of a three-year promissory note for $5,797.74, with interest at 6 percent payable semiannually. Although no interest was paid on either note prior to maturity, Products made no demand for payment or any attempt to compel payment until November, 1954, as hereinafter described.

(e) On or about December 16, 1952, shortly after affirmance on appeal of a judgment recovered by Artware against the United Brick & Clay Workers of America, AFL, and the American Federation of Labor, in the amount of $29,985.85, and following the entry of this Court's original decree, Products and Weiner caused Artware to make a partial assignment of the proceeds of such judgment to Products, allegedly as security in addition to the mortgages referred to above for its alleged indebtedness in an undisclosed amount to Products arising in large part out of alleged advances for the construction of the Paducah plant, as set forth above in subparagraph (d). [fol. 12] On or about January 22, 1954, Products received $19,320.97 by virtue of the said assignment. The re-

mainder of the judgment was assigned to Artware's counsel in payment of attorney fees.

(f) On or about April 24, 1953, shortly after the United States Supreme Court on March 9, 1953, denied Artware's petition for certiorari herein, Products and Weiner caused Artware to cease all operations. Thereafter, Products obtained from Sippi the supplies it theretofore customarily and normally had obtained from Artware. Until about November 24, 1954, Sippi and Products, without payment, used Artware's plant premises, facilities and properties at Paducah.

(g) On or about November 24, 1954, Products and Weiner caused Artware to convey to Products title to all its property, including its factory and other real estate, its equipment, machinery, fixtures, inventory and supplies, and its moneys and other assets, allegedly in payment of Artware's purported indebtedness referred to in subparagraph (d) which, with accrued interest, allegedly totaled $105,000, leaving as Artware's sole unsatisfied obligation the back pay due under the decrees herein. Artware has engaged in no business activities since the transfer of its property.

(h) Thereafter, on or about May 4, 1955, Products and Weiner conveyed the plant, with its equipment, machinery, fixtures and other contents, formerly owned in the name of and operated by Artware as aforesaid, and its other real estate, to a newly organized corporation, Industrial, which Products and Weiner caused to be organized for that purpose. Industrial continues to hold the legal title to such properties.

(i) Between about November 24, 1954, and about November 17, 1955, Sippi continued to use the facilities formerly owned and operated by Artware.

[fol. 13] (j) On or about November 17, 1955, Products and Weiner, by virtue of their control over the respective corporations, caused Industrial to lease the plant formerly owned and operated by Artware, and its equipment, machinery and fixtures, to Sippi and since December 1, 1955, Sippi has occupied and operated the said plant with the same equipment, machinery and fixtures as had Artware, making the same product previously made by Artware and obtaining its raw materials and supplies from

and selling and delivering exclusively to, Products and or its other subsidiaries, all in the same manner and under the same management as when the plant had been operated by Artware.

(k) Artware's alleged indebtedness to Products, for which the said notes, mortgages and assignments were executed to secure or pay, and in purported payment of which Artware's properties were conveyed, as set forth in subparagraphs (d), (e) and (g) above, was not a true and valid indebtedness and did not represent, and was not the result of, a full, just and true accounting of the transactions between Artware and Products, nor was it due and owing by Artware to Products, nor were said notes, mortgages, assignment, or conveyance, executed in the usual and ordinary course of business, nor for adequate and proper consideration nor for value given, but in fact, were all done, made and executed for the purpose of evading payment of the sums due under the decrees herein, all of which was well known to Products, Weiner, Arlington, Industrial and Sippi at the time of the aforesaid transactions.

6. By the foregoing conduct, Weiner, Products, Arlington, Sippi and Industrial so manipulated the business, production, sales and prices of Artware as to prevent Artware from showing any profit, and prevent Artware from accumulating any cash or other assets with which to comply with the decrees herein, an object thereof being to thwart and frustrate compliance with the said decrees.

[fol. 14] 7. By reason of the foregoing, Weiner, Products, Arlington, Sippi and Industrial, and each of them, are responsible for Artware's failure and refusal to comply with the make-whole provisions of the decrees herein, are subject to said provisions, are agents, *alter egos* of and successors to, Artware, and are liable, together with Artware, for compliance with the decrees herein.

VI. By failing and refusing, and continuing to fail and refuse, to make whole the employees named and referred to in the decrees herein, in the manner set forth in said decrees, and by their acts and conduct set forth in paragraph V and its subparagraphs above, Artware, Weiner, Products, Arlington, Sippi and Industrial, and each of

them, have resisted, violated and disobeyed, and failed and refused to comply with, the said decrees of this Court. Thereby Artware, Weiner, Products, Arlington, Sippi and Industrial, and each of them, have been, are, and continue to be, in civil contempt of this Court.

Wherefore, the Board respectfully prays:

1. That this Court issue an order requiring the aforesaid Artware, Weiner, Products, Arlington, Sippi and Industrial to answer this petition by filing with the Clerk of this Court, and serving a copy upon Louis Schwartz, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C., by a day certain, a sworn answer or answers specifically admitting or denying, or meeting by affirmative defense, each and every allegation contained in this petition.

2. That the Court issue an order requiring Artware, Weiner, Products, Arlington, Sippi and Industrial to appear before this Court, at a time and place fixed by the Court, and then and there show cause, if any there be, why they, and each of them, should not be [fol. 15] adjudged in civil contempt of court for resisting, violating and disobeying, and failing and refusing to comply with, the Court's decrees entered herein on July 30, 1952 and December 16, 1955.

3. That upon their appearance, Artware, Weiner, Products, Arlington, Sippi and Industrial, and each of them, be adjudged in civil contempt of this Court pursuant to the order to show cause.

4. That upon such adjudication, the Court enter an order requiring Artware, Weiner, Products, Arlington, Sippi and Industrial, and each of them, to purge themselves of such civil contempt by:

(a) Forthwith paying in full to each of the employees named in the said supplemental decree of December 16, 1955, the sum of money therein set forth opposite his name, together with interest from the date of said supplemental decree to date of payment, at the rate if six percent per annum.

(b) Paying to petitioner, as costs, all costs and expenses including reasonable counsel fees, incurred in the investigation, preparation, presentation and final disposition of

this proceeding for an adjudication in civil contempt of court.

5. That upon the failure of Artware, Weiner, Products, Arlington, Sippi and Industrial so to purge themselves of their civil contempt, the Court issue attachments against each of them.

[fol. 16] 6. That the Court take such other and further action and grant such other and further relief as may be just, reasonable and necessary to render effective this Court's said decrees of July 30, 1952 and December 16, 1955, and as this proceeding in civil contempt may require.

Dated at Washington, D. C., this 15th day of August, 1958.

s/ Thomas J. McDermott, Associate General Counsel, National Labor Relations Board.

Jerome D. Fenton, General Counsel, Thomas J. McDermott, Associate General Counsel, Louis Schwartz, Assistant General Counsel, Irving M. Herman, Walter N. Moldawer, Attorneys, National Labor Relations Board, Washington 25, D. C.

[fol. 17] *Duly sworn to by Thomas J. McDermott jurat omitted in printing*

[fol. 18] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

Before: Simons, Chief Judge, Martin and Miller, Circuit Judges

ORDER TO SHOW CAUSE—September 2, 1958

Upon the verified petition of the National Labor Relations Board, praying for an adjudication in civil contempt and for other civil relief, and good cause appearing therefor, it is hereby

Ordered that respondent Deena Artware, Incorporated, its officer and agent George H. Weiner, and Deena Products Co., Inc., Deena of Arlington, Inc., Sippi Products Co., Inc., and Industrial Realty Co., Inc., appear before this Court at Cincinnati, Ohio, on the 22nd day of October, 1958, at nine o'clock, a.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why they, and each of them, should not be adjudged in civil contempt of this Court, as prayed in the said petition; and

It is further ordered that respondent Deena Artware, Incorporated, its officer and agent George H. Weiner, and Deena Products Co., Inc., Deena of Arlington, Inc., Sippi Products Co., Inc., and Industrial Realty Co., Inc., make answer to said petition on or before the 1st day of October, 1958, by filing with the Clerk of this Court, and serving a copy thereof upon Louis Schwartz, Assistant General Counsel, National Labor Relations Board, Washington 25, D. C., their sworn answer or answers specifically admitting or denying, or meeting by affirmative defense, each and every allegation of said petition; and

It is further ordered that service of a copy of this order to show cause, together with a copy of the petition herein, be made by the clerk of this Court upon respondent Deena Artware, Incorporated, its officer and agent George [fol. 19] H. Weiner and Deena Products Co., Inc., Deena of Arlington, Inc., Sippi Products Co., Inc., and Industrial Realty Co., Inc., by mailing to them copies thereof by registered mail, or in any manner provided by the Rules of Civil Procedure for the service of process, on or before the 4th day of September, 1958.

Done and ordered at Cincinnati, Ohio, this 2nd day of September, 1958.

Approved for entry:

s Shackelford Miller, Jr., Judge, United States Court of Appeals for the Sixth Circuit.

[fol. 20] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF RESPONDENT, DEENA ARTWARE, INCOPORATED—Filed September 29, 1958

To the Honorable Charles C. Simons, Chief Judge, John D. Martin, Sr., and Shackelford Miller, Judges of the United States Court of Appeals for the Sixth Circuit:

Motion

Respondent, Deena Artware, moves that the petition against it be dismissed because it states no matter of complaint against it and no claims on which relief can be granted are stated in said petition.

Answer

For answer to the petition of National Labor Relations Board for adjudication in civil contempt and for other civil relief, respondent respectfully states:

I. The allegations of Paragraph I are substantially identical with statements of the Court in the opinion reported in *251 F. 2d 183*, and are admitted.

[fol. 21] II. It is admitted that Deena Products Company is an Illinois corporation maintaining a plant and principal office in Chicago, Illinois; that it now owns a large majority of the shares of stock of Deena Artware, Incorporated, Deena of Arlington, Inc., Sippi Products, Inc., and Industrial Realty Company, Inc. Directors need not be shareholders under the law of Kentucky now in force and in force when the corporations referred to were organized, unless this is required by the Articles of Incorporation. The facts as to the initial stockholdings of the several corporations will be set out below without conceding the materiality of such facts.

While respondent states that it is immaterial and irrelevant, it admits that the corporations named are subsidi

aries of Deena Products Company of Chicago. It is denied that they are otherwise adjuncts, agents or instrumentalities of Deena Products Company or that the parent or subsidiary corporations have been or are *alter egos* of or successors to Artware, or that by virtue of the nature or operation of the corporations or any of them they or any of them have been agents of Artware within the meaning or subject to the pertinent directives or decrees of the Court against Artware in the several proceedings instituted against Artware by the petitioner, and it denies that the operations of the several corporations named constitutes or is a common enterprize, even though they are and each of them is a subsidiary corporation with the controlling interest in the stock of each of them held by Deena Products Company.

III. George H. Winer has been president of Artware [fol. 22] and of the parent and subsidiary companies. Said Subsidiary companies are incorporated under the laws of the State of Kentucky and are controlled by their respective boards of directors. George H. Weiner has been a member of the boards of directors of the parent and each of the subsidiary companies. It is denied that he has been an *alter ego* or successor to Artware within the meaning of or subject to the said decrees or that he is responsible or liable for the disobedience of or failure to comply with the decrees of this Court or that there has been any disobedience of or failure to comply with said decrees, except that Deena Artware has been financially unable to pay any part of the back pay adjudged to be due its former employees. Except as aforesaid, it is denied that Weiner has owned, controlled or directed Products or its said subsidiaries. It is admitted that he has performed the usual duties of president of said corporations. It is denied that any activities of George H. Weiner in connection with the management of or acting as an officer of any said corporations except Deena Artware, Inc., are material or relevant.

IV. It is admitted that the decree and supplemental decree of this Court have been in full force and effect since their entry. It is denied that the other named corporations have had notice thereof or that it is material whether

or not they have had notice. It is denied that George H. Weiner had formal notice of said decrees, and is admitted that he had actual knowledge of the terms thereof.

[fol. 23] V. It is denied that Artware, Products, Arlington, Sippi, Industrial or Weiner have resisted, violated, disobeyed or failed or refused to comply with or continued to resist, violate, disobey or failed or refused to comply with the decree or supplemental decree of this Court in that at all or any times since the entry thereof Artware, its president and agent, Weiner, Products, Arlington, Sippi or Industrial have failed or refused or continue to fail or refuse to pay the employees named in said decrees or any of them the sums of money specified in said supplemental decree, and it is denied that Products, Arlington, Sippi or Industrial have actively concerted, participated or colluded with Artware in such failure or refusal. It is admitted that no amount has been paid to any of said employees by Artware. None of the other parties were charged by said decrees with any duties or had any duties to perform thereunder. Artware conformed to the final orders of the Board and the decrees of the Court in so far as it was able to do so. Its noncompliance as to payment to its former employees was due to its inability rather than a design to evade said decrees.

1. It is admitted that Weiner has owned a controlling interest in the stock of Deena Products Company and that Deena Products Company has owned a controlling interest in the stock of its subsidiaries, including Artware. Its ownership of stock in subsidiaries is not material and its ownership of stock in subsidiaries other than Artware is wholly irrelevant. Except through such stock ownership as [fol. 24] is admitted, though it is immaterial, Weiner has not been the real owner of Products and the subsidiaries.

2. Weiner, his wife, his son, and at times his secretary have been officers and directors of Products and of the subsidiaries. The materiality of this is not conceded and the statement is not true for the entire period since the controversy between Artware and the Union and the Board began. It is admitted without conceding its materiality that Weiner has been president of Products and each of the subsidiaries, including Artware. He has not been and is not now treasurer of any of the subsidiaries.

3. The corporations named are controlled by their respective boards of directors. It is admitted that Weiner has at all times been a member of each of the boards and is president, has been active in the management of the affairs of the several corporations.

4. It is admitted that Products and the subsidiaries named in the petition have been engaged in the manufacture, sale and distribution of lamps. Except as hereinafter affirmatively alleged, it is denied that each of said corporations has performed a peculiar function as a department or division of one enterprize as alleged. The materiality of Products' relationship to the subsidiaries named or other subsidiaries is not conceded.

(a) It is denied that "Weiner and Products organized, incorporated or operated Artware, Arlington and Sippi • • •." Without conceding to the relevancy of facts as [fol. 25] to the organizing of Arlington and Sippi, it is denied that either of these subsidiaries or Artware were organized with insufficient capital, since the capital furnished to enable them to acquire and construct certain properties as hereinafter affirmatively alleged. Advances of money were made by Products when needed and the indebtedness was guaranteed when this was required.

(b) It is denied that the entire output of Artware was sold to Products. At one time approximately 40 per cent of Artware's ouput was sold to Sandal Manufacturing Company. Sippi Products purchased an existing plant in Wickliffe, Kentucky for $25,000.00, intending at that time to supplement such ware as could be produced by Artware. Subsequently, and while labor troubles were pending at the Artware plant in Paducah, Sippi Products' plant was burned. As reconstructed it was a modern, well-equipped plant which has continued to operate. It is denied that the entire output of these plants has been sold to Products. It is admitted that the urns manufactured by Artware (except those sold elsewhere) and Sippi have been shipped either to Arlington for assembly into lamps or directly to Products. All manufactured lamps were not sold by Products; some were sold by Arlington or other subsidiaries.

(c) The allegations of Paragraph 4 (c) are only partly true and are denied except as hereinafter stated and as hereinafter affirmatively alleged. Weiner and Products did

not organize Artware or the other subsidiaries. They were [fol. 26] organized by their incorporators as hereinafter affirmatively alleged. As subsidiaries, the operating companies worked in harmony with and for the profit of themselves and Products. It is denied that Products has maintained management or overall supervision of the plants of the subsidiaries or that all of the subsidiaries operated plants or that Products has fixed the extent of production by Artware, Arlington or Sippi or fixed the prices to be received by each or any of them for their products. Such prices have been fixed, however, as would furnish an adequate return for the products of each subsidiary. The charge that materials, services and facilities were transferred from one subsidiary to another without adequate consideration or value is untrue and it is denied. It is admitted that some of the books and records of the subsidiaries here kept at the office of the president in the Chicago office of Deena Products Company, and that the president performed the usual functions of his office in the management and control of funds and bank accounts of the subsidiaries. It is denied that Products paid the obligations of the subsidiaries with its own checks or commingled funds of the subsidiaries with its funds. It is admitted that consolidated and consolidating statements were used when necessary and that Products and the subsidiaries have made consolidate tax returns. It is denied that Artware or other subsidiaries delivered material, performed services or granted the use of facilities, plants or personnel to Products or other subsidiaries without proper consideration or value therefor. Adequate consideration was paid for materials, [fol. 27] services and facilities of subsidiaries, though Products performed services and furnished to Artware without being reimbursed for same. Industrial was not organized to lease real estate to Sippi. It did lease said real estate to obtain some return from it after making efforts to sell it for an adequate consideration.

5. It is denied that Products and Weiner, through or together with Arlington, Sippi and Industrial or any of them, caused the affairs or business of Artware to be conducted in a manner which was calculated to divest or did divest Artware of its assets "during the litigation herein"

for the purpose of preventing or frustrating compliance with the Court's decrees.

(a) The allegations of this paragraph are denied with the exception of the allegation that Artware showed losses from its operations and that Products earned a profit. The charge that "Products and Weiner" required Artware to sell and deliver its output to Products or Arlington for inadequate or improper consideration is untrue. After the reconstruction of the Sippi plant at Wickliffe, the Sippi operation was more efficient. In the calendar year 1948, though prices for their products were the same for both, Sippi and Artware, the Sippi operation was profitable though Artware operated at a loss.

(b) It denies that about December, 1947, or at any time, Products commenced the construction of a new factory building at Paducah, Kentucky, adjacent to Artware's [fol. 28] plant as alleged. It admits that a contract was entered into for the construction of such a plant for the purpose of setting up a unified, integrated operation at Paducah. It denies that Products abandoned such construction but states that the construction was discontinued on account of an unlawful secondary boycott conducted by the United Brick and Clay Workers of America and the American Federation of Labor. If Deena Artware had been permitted to complete the construction of said plant so that lamps could be completely assembled at the enlarged Paducah plant, Deena Artware would have been indebted to Deena Products Company for the construction costs or it would have transferred the completed building with the land on which same was located to Deena Products Company in satisfaction of Artware's indebtedness to Deena Products on account of said construction. Determination was not reached in this matter because of the wrongful acts of said labor organizations which forced a discontinuance of the construction of the improvement. A plant at Arlington was constructed by Deena of Arlington, another Kentucky corporation. It is not true that "Products and Weiner" charged Artware with the costs of such construction or caused Artware to pay same or to reimburse Products for costs and expenses incurred or paid by Products for services or materials furnished or used in such construction. Artware and Products both sued the United Brick and Clay

Workers, the Teamsters Union and the American Federation of Labor for the construction costs of the Paducah [fol. 29] plant amounting to $83,408.26. It was understood and stated to the jury and to the Court that recovery could not be had by both plaintiffs. It was determined by the District Court and this Court that there was no contractual arrangement between Deena Products and Deena Artware which would authorize Deena Products Company to recover any part of these construction costs. Deena Products Company was not permitted to deduct for income tax purposes any part of the construction costs or losses on account of the wrongful act of the labor organizations. The amount sued for by Deena Artware, $83,408.26, was credited by the value of materials transferred to and used by Deena of Arlington and the judgment obtained against the labor organizations by Deena Artware of approximately $30,000.00 represented the balance of Deena Artware's loss after such credit was applied.

(c) Deena of Arlington, a Kentucky corporation, was organized on or about the 28th day of August, 1948, the incorporators being Earle T. Shoup, Mary L. Shoup, and W. Pelham McMurry, all of Paducah, Kentucky. It is admitted that subtantially the same plans and specifications which had been designed for the integrated plant at Paducah were used at Arlington and that materials and supplies which had already been purchased for the construction at Paducah were used. It is denied that the materials and services had been transferred to Deena of Arlington without consideration or compensation or that Artware was wrongfully or improperly charged with the cost of material used [fol. 30] at Arlington for the construction of the plant by Deena of Arlington.

(d) Copy of the Promissory Note dated October 31, 1949, may be found on pages 172 and 173 of the record in the case of Deena Products Company v. United Brick and Clay Workers, No. 11,404, in the office of the Clerk of this Court. The Mortgage from Deena Artware to Deena Products Company, bearing the same date and covering real estate in Paducah, McCracken County, Kentucky, is set out in the same record beginning on page 174. A chattel mortgage given as additional security is set out, beginning on page 180. It is denied that "Products and Weiner" caused

these mortgages to be executed. The execution was duly authorized by action of the board of directors of the respective companies. See exhibit attached to affidavit of Bernice Kessler filed in this proceeding as a part of the evidence on a motion made to prevent and enjoin the assignment of part of a judgment, *NLRB* v. *Decca Artware*, *207 F. 2d. 798*. Said mortgage was given to secure indebtedness in the amount indicated, which included but was not limited to amounts advanced for construction costs. A later mortgage was executed for a smaller additional amount to pay the costs of necessary repairs and to prevent deterioration of the improvements on the property.

(e) It is denied that "Products and Weiner" caused Artware to make a partial assignment of the proceeds of its judgement against United Brick and Clay Workers of America and the American Federation of Labor. It admits that such assignment was duly and regularly made as [fol. 31] additional security for its indebtedness to Products, which indebtedness largely exceeded the reasonable market value of the mortgaged property, plus the amount assigned out of the judgment. It is admitted that the remainder of the judgment was assigned to Artware's counsel in payment of attorney's fees for which the attorney had a lien against the judgment as a matter of law.

(f) It is denied that "Products and Weiner" caused Artware to cease operations on or about April 24, 1953 or at any time. It is true that Artware did cease operations at said time because of business conditions and an excessively large inventory, which reasons were disclosed to and were and are known to the petitioner as well as the labor unions. Operations of Sippi were continued on a limited scale because the costs were less, due to a more efficient operation. It is denied that Sippi or Products has Artware's plant facilities or properties at any time without payment.

(g) It is denied that "Products and Weiner" caused Artware to convey to Products title to all its property. It is admitted that such conveyance was made by Artware to Products in satisfaction of Artware's indebtedness to Products, which largely exceeded the reasonable market value of the property conveyed. It is admitted that Ar-

ware has engaged in no business activities since the transfer of its property and that no payments have been made on account of back pay adjudged against it in favor of its former employees.

[fol. 32] (h) It is denied that "Products and Weiner" conveyed the plant (referring presumably to the plant formerly owned by Deena Artware) to a newly organized corporation, Industrial Realty Company. Industrial Realty Company was organized on or about the 2nd day of May, 1955, as a Kentucky corporation, the incorporators being Samuel S. Boaz, Mary Roberts Dozier and Lottie Bundesman, all of Paducah, Kentucky. In consideration of 1,000 shares of the capital stock of said corporation, Deena Products Company conveyed to it the real estate and certain personal property located in the building, all of which had been conveyed to it by Deena Artware in satisfaction of its indebtedness. At the time of this conveyance the directors of said Industrial Realty Company, having been informed by an appraisal, determined that the total value of said real estate was $85,487.50 and that the total value of the personal property was $5,253.00. The action was not taken by "Products and Weiner" but by the directors of the corporations.

(i) Before the conveyance to Industrial Realty Company some use was made of the property formerly owned by Deena Artware at Paducah for warehouse purposes, and Sippi Products Company was permited at its own expense to place the facilities of the plant in condition for operation and to conduct a limited operation there. After the organization of Industrial Realty Company said plant was leased to Sippi Products, Inc., for a consideration of $500.00 per month as rent. The plant is now being occupied under an extension or renewal of that lease.

[fol. 33] (j) It is denied that "Products and Weiner" by virtue of their control over the respective corporations, caused Industrial to do the acts and things enumerated in this paragraph. As above stated, the property of Industrial is under lease to Sippi. It is denied that Sippi has occupied and operated said plant with the same equipment, machinery and fixtures as had Artware, making the same product or selling or delivering exclusively to Products or its other subsidiaries in the same manner or under the

same management as when the plant was operated by Artware, and it denies that the plant was operated by Artware in the manner alleged or inferred in this paragraph or elsewhere in the petition.

(k) All of the allegations of Paragraph (k) are denied. It is untrue that the indebtedness of Artware to Products was not a true and valid indebtedness or that it did not represent or was not the result of a full, just or true accounting of the transactions between Artware and Products, or that it was not due and owing by Artware to Products. The Notes, Mortgages, Assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given. The allegation that they were all done, made and executed for the purpose of evading payment of the sums due under the decrees herein is false and is denied. It is denied that the allegations were well known to Products, Weiner, Arlington, Industrial or Sippi, because the facts alleged were not true. Industrial had not then been [fol. 34] organized. The true facts as to the existence and genuineness of the indebtedness were never disguised or concealed. They were matters of record and have at all times been known to the representatives of the petitioner and of the employees.

6. It is denied that by the conduct alleged, or at all, Weiner, Products, Arlington, Sippi or Industrial so manipulated the business, production, sales or prices of Artware as to prevent Artware from showing any profit or prevent Artware from accumulating any cash or other assets with which to comply with the decrees herein, or that there was any object to thwart compliance with said decrees.

7. It is denied that by reason of any allegations therefore made in the petition, which allegations are denied as aforesaid, Weiner, Products, Arlington, Sippi or Industrial or any of them, are responsible for Artware's failure or refusal to comply with the make-whole provisions of the decrees herein or are subject to said provisions or are agents, *alter egos* of or successors to Artware or are liable together with Artware for compliance with the decrees herein.

VI. It is denied that by failing or refusing or continuing to fail or refuse to make whole the employees named or

referred to in the decrees in the manner set forth in the decrees or by their acts or conduct as set forth in Paragraph V or it subparagraphs above, which have been denied, Artware, Weiner, Products, Arlington, Sippi and Industrial or either or any of them, have resisted, violated or disobeyed or failed to comply with the said [fol. 35] decrees of this Court. It is denied that Artware, Weiner, Products, Arlington, Sippi or Industrial or any of them have been, are, or continue to be in civil contempt of this Court.

Second Defense

Deena Artware was organized as a Kentucky corporation in January, 1946. Its capital stock, consisting of 800 shares, had no par value. It was recited in the Articles that the stock was owned as follows: Marliss Manufacturing Company, an Illinois corporation, 391 shares; George H. Weiner, 3 shares; Dorothy Weiner, 3 shares; Edward Brill, 3 shares. The incorporators were Melvin A. Garretson, Irving Coppel and Jean Levich.

The corporation acquired a small pottery plant in Paducah, Kentucky, the operation of which had not been successful prior to that time. It paid for this plant $65,000.00. Weiner never owned more than three shares of its stock. Deena Products Company acquired and still holds a majority of the shares issued and outstanding. The pottery plant was located on a lot at Third and Ohio Streets in Paducah, fronting 115 feet, 6 inches on Third Street. In rear of this building and separated from it by an alley and the tracks of a railroad, was a lot owned by the corporation, approximately 300' x 123'. There was a small warehouse building approximately 41' x 123' on the south end of this lot. A plat of these properties appears on the fly-leaf of respondent's brief filed [fol. 36] in the first enforcement proceeding instituted by the National Labor Relations Board herein.

Deena Artware entered into a contract for the construction at a cost of approximately $83,000.00 of a plant or addition to its plant on the vacant property above referred to. Its purpose was to equip the new plant so that the lamp bases made in the pottery could be finished in the new plant and turned out as a finished product in

an integrated manufacturing plant located on the Paducah property.

During the early part of the year 1948 a labor board election was conducted at the plant and the United Brick and Clay Workers of America was selected as the representative of the employees. During negotiations between the employer and a committee of the union an engagement was made for a meeting of both sides with Garth Ferguson, a conciliator in the employ of the United States Government. The meeting was to be held on Wednesday in the offices of the company's attorney. Mr. Ferguson found it necessary to postpone the meeting until the following Friday. He attempted to notify all the parties but for some reason his notice of postponement failed to reach Earl Bellew, an officer of the union. Mr. Bellew appeared on Wednesday with the union committee at the place fixed for the meeting with the conciliator.

When he learned that the meeting had been postponed he discussed the situation with his committee outside of the office building where the meeting was to be held, and [fol. 37] determined to call a strike. The strike began that afternoon. The plant continued to operate with employees who remained at work. The familiar pattern of picketing, name-calling, violence and other disorders followed, and the picket line was shortly thereafter extended from the entrances to the plant so as to include all of the property on which the construction work was in progress. There was no dispute involving the contractors doing the construction work or their employees. Nevertheless, the picket line forced a discontinuance of the construction work.

Two actions for damages were filed in the United States District Court, one by Deena Artware, the Kentucky corporation which owned the property and made the contract for the construction, and the other by Deena Products Company, which had advanced money for the construction work and which expected that the completed plant would either be transferred to it with the land on which it was located or would be mortgaged to secure it for the funds it had advanced. The amount of the construction contract, $83,468.26, was sought to be recovered in both actions. It was understood, however, and stated to the Court and the jury, that the recovery could be had in only one action.

The items of damage sought to be recovered were, (1) The cost of constructing the foundation for the new plant, the construction work having progressed to that point before it was stopped by the unlawful secondary boycott; (2) The loss resulting from breakage and cost of shipment from Paducah to Chicago where the manufacturing process was [fol. 38] completed between the time when the Paducah plant would have been ready for use and the opening of a new plant at Arlington and built by Deena of Arlington; and (3) The permanent loss on account of breakage and transportation incident to the required shipments from Paducah to Arlington after the opening of the plant under construction by the subsidiary corporation at Arlington.

The parent corporation had orders from customers which should be filled to prevent loss of the customer's business. In order to avoid this loss and in order to use the building material which had been purchased, and avoid demurrage, the Arlington subsidiary was organized and the Arlington plant constructed by it.

Deena Artware recovered only that part of the construction cost represented by the work of building the foundation, which was and still is useless, credited by the amount of material shipped to and used by Deena of Arlington. The trial court thought that the other items referred to under (2) and (3) above could not be recovered by either corporation. The court held that there was no such relationship, contractual or otherwise, between Deena Artware and Deena Products Company as would authorize the latter to recover these costs. Artware recovered a judgment for approximately $30,000.00 against the United Brick and Clay Workers of America and the American Federation of Labor. A verdict was directed in favor of the Teamsters Union, which was also made a defendant.

On the question of the connection between Deena Products and Deena Artware on our appeal for Products in [fol. 39] No. 11,404, the Court in an opinion written by Judge Martin, stated:

> "And it being the further view of the Court that any damages suffered by the appellant, by reason of the acts complained of, are, regardless of the liability

> or non-liability of the appellees to it under the provisions of the statute, section 303(a) (1) of the Labor Management Relations Act of 1947, section 187(a) (1), Title 29, U.S. Code, contingent and entirely dependent upon certain contractual relations with its subsidiary, Deena Artware, Inc., which contractual relations did not exist, and accordingly are not recoverable in this action." *Deena Products Co. v. United Brick & Clay Workers, &c., #11,404, 195 F (2d) 612.*

The record on that appeal will show that the relationship between Products and Artware was fully explored in the trial. An itemized statement of the expenditures aggregating $83,408.26 appears in the record on a separate sheet between pages 81 and 82. George Weiner was examined and cross-examined fully. (Transcript, pages 262 to 324). Harry L. Appleman, a certified public accountant, who had audited the accounts of Deena Products Company and Deena Artware as an independent auditor, was introduced and examined as to these costs and as to the indebtedness incident to the costs. The books of Artware and Products were produced in court. The examination and cross-examination of Weiner and Appleman referred to above supplemented a deposition of George H. Weiner taken prior to trial. (Transcript, pages 9 to 136). See also interrogatories propounded to the plaintiffs covering items of damages. It will also be noted (Transcript, page 89) that plaintiffs were required to produce income tax returns. Those tax returns showed that Deena Products Company was not permitted to deduct on its tax return the loss on account of the construction [fol. 40] costs. When the Bureau of Internal Revenue disallowed the deduction for Products, it was permitted for Artware. The Bureau of Internal Revenue therefore reached the same conclusion reached by the District Court and affirmed by this Court as to the relationship between the parent and subsidiary. All of the facts developed in this record are and have been known to representatives of the petitioner.

The note and mortgages executed to secure indebtedness of Artware to Products, dated October 31, 1949, appear in the Transcript beginning on page 172. In that pro-

ceeding the defendants attempted to subpoena records of Sippi Products. Sippi appeared by independent counsel and moved that the subpoena be quashed. Sippi's manager was not required to produce records, even though it was contended that a record of its production which was purchased by Deena Products was material.

Both the judgment of the United States District Court in favor of Deena Artware against the Clay Workers Union and the A. F. of L. and the ruling of the Labor Board were affirmed. *(198 F. 2d 645, 198 F. 2d 637).* In December, 1952, Deena Artware assigned a part of its judgment to its attorneys and the balance to Deena Products Company in part payment of its indebtedness. Petitioner atempted to obtain a restraining order to prevent these assignments. The motions of the petitioner were denied. *207 F. 2d 798, 1953.* The same questions as to the indebtedness of Artware to Products and Products' rights to secure and collect the indebtedness were discussed in a motion for inspection and discovery filed by the [fol. 41] petitioner in 1957. The motion was denied. *251 F. 2d 185.* In the meantime Artware, having been unable to pay its indebtedness to Products, conveyed to Products in satisfaction of the indebtedness its Paducah property. At the time of this conveyance the Paducah property had been appraised at approximately $85,000.00, and the indebtedness amounted to approximately $161,000.00. See affidavit of independent auditor, Harry Appleman, heretofore filed herein.

Sippi was incorporated as heretotore alleged as a Kentucky corporation in February, 1948. Its incorporators were Earle T. Shoup, Mary L. Shoup and W. Pelham McMurry, all of Paducah, Kentucky. It purchased a small pottery at Wickliffe, Kentucky, for $25,000.00. In 1948, while the labor dispute in Paducah was in progress, the plant of Sippi Products burned. It was restored and placed in operation as early as practicable, its equipment having been modernized and improved.

Sippi made some use of the Paducah plant which had been conveyed to Deena Products Company, as a warehouse for which it was duly charged. Industrial Realty Company, a Kentucky corporation, was organized as aforesaid in May, 1955, with the incorporators named above.

The date of its incorporation conclusively shows the falsity of numerous allegations in the petition as to Industrial's participation in events which transpired before it was organized. In consideration of capital stock in Industrial Deena Products Company conveyed to it the real property [fol. 42] in Paducah and such personal property as remained in its hands and which had been acquired by it from Deena Artware. As hereinabove alleged, Industrial leased the Paducah plant to Sippi for a rental of $500.00 a month. The facts alleged in this answer are supported by records, instruments and evidence brought out in the trial before the United States District Court, and are matters of record which have at all times been available to and known to petitioner and its representatives. The transfer from Deena Artware to Deena Products Company of its Paducah properties was made for a fair consideration, namely, the indebtedness which exceeded the value of the properties conveyed. The conveyance was made in payment of a just debt and not for the purpose of obstructing the enforcement of a decree of this Court. Such conveyance did not amount to and was not contempt of this Court. It has complied with the Court's enforcement decrees in other respects and its non compliance with the order that it pay approximately $300,000.00 to its former employees was due to its inability to make such payment and not to any intent or purpose to evade the decree. Such non-payment on account of inability to pay was not contempt of this Court.

Wherefore, respondent prays that the petition be dismissed and that it recover its costs and for all other and proper relief.

James G. Wheeler, of Wheeler & Marshall, and Citizens Bank & Trust Co., Paducah, Kentucky, Attorney for Respondent.

[fol. 43] *Duly sworn to by George H. Weiss, Jr.* *Jurat omitted in printing.*

[fol. 44] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF GEORGE H. WEINER—Filed September 29, 1958

1. George H. Weiner, entering his appearance specially and for the sole purpose of making this motion, moves that the petition filed herein against him be dismissed for want of jurisdiction.

2. In the event that the foregoing motion should be overruled, and without waiving same, said respondent adopts as his own the allegations of the answer of Deena Artware.

James G. Wheeler, of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Deena Products Company.

[fol. 45] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF DEENA PRODUCTS COMPANY—Filed September 29, 1958

1. Deena Products Company, an Illinois corporation, entering its appearance specially and for the sole purpose of making this motion, moves that the petition against it be dismissed for want of jurisdiction.

2. In the event that the foregoing motion should be overruled, and without waiving same, said respondent adopts as its own the allegations of the answer of Deena Artware.

James G. Wheeler, of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Deena Products Co.

[fol. 46] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF DEENA OF ARLINGTON—Filed September 29, 1958

1. Deena of Arlington, a Kentucky corporation, entering its appearance specially and for the sole purpose of making this motion, moves that the petition against it be dismissed for want of jurisdiction.

2. In the event that the foregoing motion should be overruled, and without waiving same, said respondent adopts as its own the allegations of the answer of Deena Artware.

James G. Wheeler, of Wheeler & Marshall, 901 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Deena of Arlington.

[fol. 47] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF SIPPI PRODUCTS COMPANY—Filed September 29, 1958

1. Sippi Products, Company, a Kentucky corporation, entering its appearance specially and for the sole purpose of making this motion, moves that the petition against it be dismissed for want of jurisdiction.

2. In the event that the foregoing motion should be over-

ruled, and without waiving same, said respondent adopts as its own the allegations of the answer of Deena Artware.

James G. Wheeler, of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Sippi Products Company.

[fol. 48] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION AND ANSWER OF INDUSTRIAL REALTY COMPANY—Filed September 29, 1958

1. Industrial Realty Company, a Kentucky corporation, entering its appearance specially and for the sole purpose of making this motion, moves that the petition against it be dismissed for want of jurisdiction.

2. In the event that the foregoing motion should be overruled, and without waiving same, said respondent adopts as its own the allegations of the answer of Deena Artware.

James G. Wheeler, of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Industrial Realty Company.

[fol. 49] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MOTION FOR DISCOVERY AND INSPECTION AND DEPOSITIONS UPON ORAL EXAMINATION—Filed October 11, 1958

Comes now the National Labor Relations Board, petitioner herein, and respectfully moves this Court for an order as follows:

1. Directing respondent, Deena Artware, Incorporated, to produce and permit petitioner to inspect, copy and photograph or microfilm, at such time and place as the Court may fix, each of the following:

1. Stock subscription books, stock transfer books, minutes and all other records and documents showing capital investment, ownership of stock in Deena Artware, Inc., consideration received for same and the names of incorporators, directors and officers.

2. Personnel and payroll records showing names and job titles of management officials, office employees and persons in charge of keeping the corporation's books since April 5, 1948.

3. Cash books, bank statements, deposit books, check stub books, vouchers and cancelled checks showing monies received, paid out and on hand since April 5, 1948.

4. All financial statements, balance sheets, profit and loss statements, auditors' reports and copies of income and other tax returns for the period from April 5, 1948, to date.

5. Ledgers and books of accounts receivable and payable for the period from April 5, 1948, to date.

[fol. 50] 6. All books, records, contracts, agreements, notes, deeds of trust, deeds of conveyance, inventories, delivery records, invoices, bills of sale, and other documents showing the acquisition, by purchase or otherwise,

and disposition by Deena Artware, Inc. of real and personal property, including land, plants, fixtures, equipment and machinery, and showing any mortgages, liens or other encumbrances placed thereon, the consideration therefor, and whether, and in what manner, such mortgages, liens or other encumbrances were satisfied, and all minutes showing authorization of such transactions by the Board of Directors.

7. Cash books, deposit books, ledgers, books of accounts receivable and payable and other records showing advances of money made by Deena Products Co., Inc. to or on behalf of Deena Artware, Inc., and any repayment thereof.

8. Purchase books, cash books, ledgers, copies of requisitions, invoices, inventory records and other records and memoranda showing materials, supplies and services sold or furnished to Deena Artware, Inc. by Deena Products Co., Inc., or purchased or ordered by Deena Products Co., Inc., for use by Deena Artware, Inc., and any payment therefor to, or reimbursement of, Deena Products Co., Inc. by Deena Artware, Inc.

9. Sales books, production records, delivery records, invoices, journals, cash books and ledgers showing the sale, transfer and shipment of the products of Deena Artware, Inc., including sales, transfers and shipments to Deena Products Co., Inc., Deena of Arlington, Inc., or any other subsidiary of Deena Products Co., Inc., or any other purchaser, and any payment made therefor.

10. Accountings of their respective obligations and credits rendered between Deena Artware, Inc. and Deena Products Co., Inc., showing any balance due or owing.

[fol. 51] 11. All cost records and accounts showing cost of products manufactured by Deena Artware, Inc. and records showing the sales prices thereof and the method and manner by which the sales prices were established.

12. Copies of all reports, including reports of production activities, made by Deena Artware, Inc., to Deena Products Co., Inc., and orders and inter-office memoranda sent by Deena Artware, Inc. to or received by Deena Artware, Inc. from Deena Products Co., Inc., stating styles, types and quantities of products manufactured or to be manufactured by Deena Artware, Inc.

13. All plans, specifications, estimates, aggreements, memoranda, contracts, invoices, cancelled checks, delivery records, bills of lading and other records showing costs of materials and services for plant construction during 1948 and 1949, including construction of a new plant on premises of Deena Artware, Inc. at Paducah, Kentucky, on which construction began in early 1948 and was abandoned about July 1948, and showing monies paid out or owing therefor.

14. All invoices, bills of lading, delivery records and receipts, and other records showing the construction materials which orginally were ordered or purchased for the construction of the abandoned Paducah plant of Deena Artware, Inc., but instead were delivered to and used, in 1948 and 1949, in the construction of the plant in Arlington, Kentucky, now occupied by Deena of Arlington, Inc., showing any payment therefor to Deena Artware, Inc., and for the costs of transportation to Arlington.

15. Sales books, ledgers, invoices, production records, delivery records and all other records showing materials, products and services delivered or rendered by Deena Artware, Inc., after May 1, 1953, to or on behalf of Deena Products Co., Inc., Deena of Arlington, [fol. 52] Inc., Sippi Products Co., or any other company or person, including the use and operation of the plant or facilities of Deena Artware, Inc. and services of its employees, and any monies paid or owing for same.

II. Directing Deena Products Co., Inc., Chicago, Illinois, and Deena of Arlington, Inc., Arlington, Kentucky, Sippi Products Co., Wickliffe, Kentucky, and Industrial Realty Co., Inc., Paducah, Kentucky, all affiliated with respondent Deena Artware, Incorporated, to produce and permit petitioner to inspect, copy and photograph or microfilm, at such times and places as the Court may fix, the following books, records and documents:

Deena Products, Co., Inc.

1. Cash books, check stub books, cancelled checks, ledgers, journals, invoices, delivery records and other records showing advances of money, materials, or credit made by Deena Products Co., Inc., to or on behalf of Deena Artware, Inc., and materials, supplies, equipment, fixtures,

and services paid for by Deena Products Co., Inc., on behalf of Deena Artware, Inc., any any payment or reimbursement therefor by Deena Artware, Inc.

2. Requisitions, sales books, delivery records, invoices, cash books and other records showing materials, supplies and equipment shipped to Deena Artware, Inc., by Deena Products Co., Inc., the price thereof paid by Deena Products Co., Inc., and the amount paid therefor by Deena Artware, Inc. to Deena Products Co., Inc., for the period since April 5, 1948.

3. Purchase books, production records, delivery records, invoices, journals, cash books and ledgers showing the purchase and or shipment of manufactured products from Deena Artware, Inc., by Deena Products Co., Inc., the delivery thereof to Deena Products Co., Inc., or to any other person or company at the request or direction of Deena Products, Inc., the purchase price thereof and any payment thereof made to Deena Artware, Inc., for the period since April 5, 1948.

[fol. 53] 4. Accountings of the respective obligations and credits rendered between Deena Artware, Inc. and Deena Products Co., Inc. and showing the balance due.

5. All reports made to Deena Products Co., Inc. by Deena Artware, Inc. of production and manufacturing activities and copies of orders and inter-office memoranda between Deena Products Co., Inc. and Deena Artware, Inc., relating to style, type and quantity of product required to be manufactured.

6. Specimen copies of various stationery forms used by Deena Products Co., Inc. listing the addresses of its subsidiaries.

7. Copies of consolidated financial statements furnished Dun & Bradstreet and other commercial credit agencies between 1948 and 1953, and accompanying correspondence and written representations.

8. Financial statements, balance sheets, profit and loss statements, auditors' reports and income and other tax reports from 1948 to 1954, inclusive.

9. Mortgages or deeds of trust executed by Deena Artware, Inc. for real estate of which it was the owner of record, and chattel mortgages on plant fixtures, machinery

and equipment in favor of Deena Products Co., Inc. written obligations for which such mortgages or deeds of trust were given as security to Deena Products Co., Inc. cash books, check stub books, cancelled checks, invoices, delivery records and other records showing the consideration furnished therefor and interest received.

10. Assignment executed by Deena Artware, Incorporated to Deena Products Co., Inc. of its interest in a judgment for approximately $30,000 against United Brick & Clay Workers of America and AFL (after payment of attorneys' fees); cash books, check stub books, cancelled checks, invoices, delivery records, and other records showing the consideration paid for such assignment.

[fol. 54] 11. Agreements and deeds of conveyance and transfer to Deena Products Co., Inc., of the real estate of which Deena Artware, Inc. was the owner of record, and of the plant fixtures, machinery and equipment which it owned; cash books, check stub books, cancelled checks, invoices, delivery records, and other records showing the consideration furnished for such conveyance and transfer and minutes of Board of Directors authorizing such acquisition.

12. Agreement for sale, bill of sale and deed of conveyance of the real estate plant fixtures, equipment and machinery referred to above by Deena Products Co., Inc. to Industrial Realty Co., Inc. (or true copies thereof); and cash books, deposit books, and other records showing the consideration received therefor; also minutes of Board of Directors authorizing such conveyance and transfer.

13. Minutes and memoranda of staff meetings of management officials of Deena Products Co., Inc. concerning action to be taken with regard to (a) removing operations from Chicago to Kentucky, opening a plant in Paducah and construction in or about 1948 of another Paducah plant; (b) abandoning the second Paducah plant before completion and constructing a plant at Arlington, Kentucky, instead; and (c) organizing Industrial Realty Co., Inc. and conveying the Deena Artware Paducah plant to Industrial Realty Co., Inc.

14. All cash books, check stub books, cancelled checks, invoices, delivery records, hauling invoices and receipts showing materials delivered to the Arlington plant which

had been originally ordered, purchased or consigned to, and for the construction of, the second Paducah plant referred to above, any payment therefor by Deena Products Co., Inc. and any reimbursement therefor by Deena Artware, Inc.

15. All plans, specifications, estimates, contracts, invoices, delivery records, cancelled checks, check stub books, bills of lading, and other records showing the costs incurred in construction of the second Paducah plant referred to above.

[fol. 55] 16. Stock subscription and transfer books, minutes and other records showing the ownership of the stock of Deena Products Co., Inc., the consideration received therefor, and names of directors and officers.

17. Payroll and personnel records showing names and job titles of management officials, office employees and persons in charge of keeping the corporation's books between 1948 and 1954.

18. Copy of income tax return showing claim for loss resulting from the abandonment of the construction of the second Paducah plant referred to above.

Deena of Arlington, Inc.

1. Stock subscription books, stock transfer books, minutes and other records showing ownership of stock of Deena of Arlington, Inc., the consideration received for same and the names of incorporators, directors and officers.

2. Payroll and other personnel records showing names and job titles of management officials, office employees and persons in charge of keeping the corporation's books.

3. Purchase books, invoices, delivery records, journals, ledgers and other records showing the acquisition, by purchase or otherwise, and receipt from Deena Artware, Inc. of products manufactured by Deena Artware, Inc. and how payment for same was made.

4. All invoices, including transportation invoices, delivery records and receipts, and other records showing materials used in the construction of the Arlington plan in 1948-49, which had originally been purchased or ordered for use in the construction of a Deena Artware, Inc. plant in Paducah, and all cash books, cancelled checks, check stub books, and other records showing any reimbursement made to Deena Artware, Inc. for same.

5. All plans, specifications, estimates, agreements, and contracts for the construction of the Arlington, Kentucky, plant in 1948-49.

[fol. 56] *Sippi Products Co.*

1. Stock subscription books, stock transfer books, minute and other records showing ownership of stock of Sippi Products Co., the consideration received for same and the names of incorporators, directors and officers.

2. Payroll and other personnel records showing names and job titles of management officials, office employees and persons in charge of keeping the corporation's books.

3. Purchase books, invoices, delivery records, journals, ledgers, and other records showing materials, products and services delivered, or rendered, to Sippi Products Co. by Deena Artware, Inc. and payment or credit given therefor.

4. Inventories, invoices and other records of material stored at Deena Artware's Paducah premises from 1948 to 1954, and any payments for such storage services.

5. All financial statements, balance sheets, profit and loss statements, auditors' reports and copies of income and other tax returns for the period 1948 to date.

6. Ledgers and books of accounts receivable and payable for the period 1948 to date.

7. All books, records, contracts, agreements, notes, deeds of trust, deeds of conveyance, inventories, delivery records, invoices, bills of sale, and other documents showing the acquisition, by purchase or otherwise, and disposition by Sippi Products Co. of real and personal property, including land, plants, fixtures, equipment and machinery, and showing any mortgages, liens or other encumbrances placed thereon, the consideration therefor, and whether, and in what manner, such mortgages, liens or other encumbrances were satisfied, and all minutes showing authorization of such transactions by the Board of Directors.

[fol. 57] 8. Lease between Industrial Realty Co., Inc. and Sippi Products Co., of the Paducah plant and equipment formerly occupied and used by Deena Artware, Inc. and the cancelled checks, check stub books, cash books and other records showing the payment of the rental.

Industrial Realty Co., Inc.

1. Stock subscription books, stock transfer books, minutes and other records showing ownership of stock of Industrial Realty Co., Inc., the consideration received for same and the names of incorporators, directors and officers.

2. Payroll and other personnel records showing names and job titles of management officials, office employees and persons in charge of keeping the corporation's books.

3. Agreements, contracts, notes, mortgages, chattel mortgages, deeds of conveyance, deeds of trust, leases and all other documents showing and or relating to the purchase, lease or rental of the premises, land, fixtures, machinery and equipment formerly owned or used by Deena Artware, Inc., at Paducah, Kentucky, and cash books, cancelled checks, check stub books and other records showing the consideration furnished therefor, and the minutes of Board of Directors authorizing the acquisition thereof, by purchase or otherwise, by Industrial Realty Co., Inc.

III. Directing that depositions be taken upon oral examination by petitioner before a notary public or other officer authorized by law to administer oaths, at such time and place as the Court may direct, of George H. Weiner, Bernice Kessler and Ida C. Jarrett, present or former officers of respondent Deena Artware, Incorporated, and present or for- [fol. 581] mer officers of the aforesaid affiliated corporations; Harry L. Appleman, accountant supervising the bookkeeping of respondent and of said affiliated corporations; and Corbin Meriwether, Mrs. Kathryn Hendren and Mrs. Lee Nola Henson, present or former employees of respondent, or any other present or former employee or agent of respondent or the said affiliated corporations having knowledge of the facts, with respect to the financial ability of respondent to comply with the provisions of the decree of this Court entered herein against respondent on July 30, 1952, and of the supplemental decree entered herein on December 16, 1955, directing it and its officers, agents, successors and assigns to pay back pay to the employees named in the Appendix to the latter decree; with respect to the existence or disposition of the property and assets of respondent, including the details of any transfers thereof to the said affiliated corporations; with respect to the deal-

ings and relationship of respondent with said affiliated corporations; with respect to the successorship of said affiliated corporations to respondent within the meaning of the said decrees of this Court; and with respect to such other facts as may be relevant for the purpose of discovery.

IV. Granting such other and further relief as may be just and proper in the premises.

The corporations named above, each has possession, custody or control of the foregoing books, records and documents relating to their respective businesses and business operations. As more fully appears from the above affidavit of Thomas J. McDermott, each of the foregoing books, records and documents and documents constitutes or contains evidence relevant or material to a matter [fol. 59] involved in these proceedings, and the depositions prayed for by this motion are necessary for the purposes of the discovery and inspection and for the purpose of effecting compliance with the aforesaid decrees of this Court.

Dated, Washington, D. C., October 9, 1958.

National Labor Relations Board. By: Thomas J. McDermott.

Jerome D. Fenton, General Counsel, Thomas J. McDermott, Associate General Counsel, Louis Schwartz, Associate General Counsel, Irving M. Herman, Attorney, National Labor Relations Board, Washington 25, D. C.

[fol. 60] [Title omitted]

Affidavit of Thomas J. McDermott—Filed October 11, 1958

District of Columbia, ss:

Thomas J. McDermott, being first duly sworn, deposes and says:

1. I am Associate General Counsel of the National Labor Relations Board (herein called the Board), and I am familiar with the facts herein, and make this affidavit in support of

the attached Motion for Discovery and Inspection and Depositions upon Oral Examination.

2. On July 30, 1952, this Court entered its decree herein enforcing an order issued by the Board on October 25, 1949, against respondent Deena Artware, Incorporated (herein called Artware). The decree directs, *inter alia*, that respondent, its officers, agents, successors and assigns, make whole certain named employees for losses suffered by them by reason of respondent's discrimination against them in violation of the National Labor Relations Act. On October 16, 1953, the Court entered a supplemental decree directing, *inter alia*, that said respondent, its officers, agents, successors and assigns:

> (a) Pay to the employees named in the Appendix attached hereto, who were found to have been discriminated against by a Board Decision and Order issued October 25, 1949, as enforced by this Court, net back pay in the amounts set out in the Appendix.

[fol. 61] The said Appendix lists the names of 56 employees and the specific amount of back pay due each of them, totalling approximately $300,000.

3. Since entry of the decrees, Artware has failed and refused to pay the amounts due pursuant to the decrees, or any part thereof. It alleges that it has no assets.

4. However, on the basis of available information it appears, and I believe, that Artware and several affiliated corporations were and are integral parts of a single enterprise substantially owned and controlled by George H. Weiner, president and treasurer of Artware; that the operations of Artware were conducted in a manner which prevented it from having assets, and thereby prevented compliance with the back pay provisions of the decrees; that Artware's assets were siphoned off or transferred to affiliated companies, in consequence of which it appears that Artware was left with no assets with which to comply with the decree; that the affiliated corporations are also agents and or successors to Artware within the meaning of the decrees; and that the aforesaid George H. Weiner and the affiliated corporations referred to above are subject to the back pay provisions of the decrees and responsible for the failure to comply therewith, and liable

for payment of said back pay. This information may be summarized as follows:

(a) At all times material herein, Artware and three other corporations organized under and existing by virtue of the laws of the State of Kentucky, namely, Deena of Arlington, Inc. (herein called Arlington), Sippi Products Co. (herein called Sippi), and Industrial Realty Co. (herein called Industrial), were and are subsidiaries of, and actually wholly owned by, Deena Products Co., Inc. (herein called the parent company), a corporation organized under and existing by virtue of the laws of the State of Illinois. George H. Weiner was, and still is, the owner of substan- [fol. 62] tially all of the stock of the parent company, which in turn owns substantially all of the stock of the other corporations named above. He was, and is, the president and treasurer of, and exercises complete control and domination over, the parent company and each of its said subsidiaries. The other officers and directors of the parent and subsidiary corporations were and are George H. Weiner's private secretary, his wife and his son.

(b) Artware and the several commonly owned corporations herein named are integral parts of a single enterprise engaged in the manufacture and sale of one product, namely, lamps. In this common enterprise, each corporation acts as though a department of a single corporation, performing an assigned function in the manufacture and sale of the end product. Thus, Artware and Sippi (which, as I point out later, has succeeded to Artware's role in this enterprise), manufacture and Sippi sells manufactured the arms which are used as the lamp bases; Arlington manufactures the shades and assembles the lamps; Industrial, a realty company which, since Artware ceased all manufacturing operations, holds title to the plant and equipment formerly used by Artware and now used by Sippi; and the parent company sells and distributes the end product. These, and other subsidiary corporations, were organized by Weiner and his parent company solely to serve the purposes and ends of the parent company as directed by Weiner, and do not engage in any business independently of the parent company; none of the subsidiaries has customers other than the parent company or fellow subsidiaries; for example,

Artware's entire output was "sold" and shipped to either Arlington or the parent company.

(c) At all times material therein, the subsidiaries were under the same overall management and supervision of the parent company and submitted regular daily and monthly [fol. 63] reports of their operations to the parent company, which determined and controlled the amount of their production, and the type, style and quantity of lamps to be manufactured. The parent company furnished its subsidiaries, including Artware, the necessary supplies and raw materials; advanced their operating capital; kept their books of account; and controlled their bank accounts and funds. At least on a number of occasions the parent company paid Artware's obligations with its own checks or combined payments for their separate obligations in the same check. The parent company fixed and determined the prices it paid to Artware for its products. These prices bore no realistic relation to costs and profit margin or fair value.

(d) The parent company represented to its customers, suppliers and others, that the plants and operations of its subsidiaries, including Artware's, were part of its own business, and regularly issued to credit agencies consolidated financial statements showing the financial condition of the entire enterprise without break-down as to the subsidiaries and without showing any obligations between them.

5. Deponent is informed and believes that the said Weiner, through the parent company and its various subsidiaries, including those named herein, siphoned off the assets and properties of Artware during the prolonged litigation in this case, thereby frustrating compliance with the back pay decrees of this Court. Thus, following the filing with the Board on April 5, 1948, of the charge initiating this proceeding:

(a) On October 31, 1949, a few days after the Board issued its order herein on October 25, 1949, ordering reinstatement with back pay, Artware executed mortgages on all of its real and personal property, in an amount in excess of $75,000, in favor of the parent company.

[fol. 64] (b) Between 1948 and 1953, the parent company manipulated the prices and production of Artware

so as to deplete Artware's assets and enhance those of the parent company and other subsidiaries. It fixed the prices paid Artware for the latter's products at less than their fair value and so to show an operating loss by Artware while the parent company prospered and the tangible net worth of the entire enterprise showed a substantial growth. At the same time, the parent company diverted to other subsidiaries its orders for the pottery bases theretofore supplied by Artware.

(c) The parent company caused valuable assets and properties of Artware to be transferred to itself and to its other subsidiaries and made use of Artware's premises, properties and services of its employees without adequate compensation therefor.

(d) The parent company required Artware to pay and reimburse it for the costs and expenses of the construction of a new plant at Paducah, Kentucky, commenced in early 1948, apparently intended to be operated by the parent company, or by a new subsidiary on its behalf, and required Artware to bear the losses resulting from the subsequent abandonment of such incompleted plant when the parent company decided instead to construct the new plant at the nearby town of Arlington and organized Deena of Arlington, Inc., to operate that plant. The parent company caused to be transferred for use in the construction of the Arlington plant, without consideration to Artware, materials and services bought for or on behalf of, and paid for by, Artware, for the construction of the new Paducah plant.

(e) In about December, 1952, a few months after entry of the original decree of this Court, Artware allegedly made a partial assignment to the parent company of its interest in a judgment for approximately $30,000 [fol. 65] covered against the United Brick & Clay Workers of America, AFL, and the American Federation of Labor, for losses allegedly suffered as the result of the abandonment of the new Paducah plant referred to above. Pursuant to such assignment, there was paid over to the parent company in about January, 1954, the sum of $19,000, the balance of the judgment being paid to Artware's attorneys for legal services.

(f) Within six weeks after respondent offered reinstatement to the discriminatees pursuant to the Court's order, Artware, on or about May 1, 1953, ceased operations and subsequently, in 1954, transferred and conveyed all of its real and personal property, its plant fixtures, machinery and equipment, to the parent company which thereafter conveyed the same to its subsidiary, Industrial, organized about November 1954, for this specific purpose. Thereafter, Industrial leased the plant and all its equipment to Sippi, which continues to operate the same plant, under the same management as Artware, manufacturing the same or similar products for the parent company and its other subsidiaries. Thus, although the enterprise continues to operate in the same manner as before, without any change except in the name of the subsidiary operating the Paducah plant, respondent has seemingly been divested of all visible assets and property.

6. Petitioner seeks an examination of the books, records, documents and witnesses described above in order to show the foregoing facts by probative evidence and thereby prove that Artware, its officers and agent and its *alter egos* or successors and assigns, have failed to comply with the decrees herein although required to do so and that, within the meaning of said decrees and the opinion of this Court rendered herein on November 10, 1953 (207 F. 2d 708, 802), any alleged "financial inability on the part of respondent to pay the awards is . . . the result of improper actions on its part in the meantime."

[fol. 66] 7. The books, records and documents aforesaid are in the custody, possession or control of Artware, Arlington, Sippi, Industrial and their parent company, and contain evidence material and relevant to the matter of compliance with the said decrees of this Court. Prior to making this motion, petitioner requested the attorney for Artware for permission to examine the necessary books and records but permission was refused. Petitioner thereafter filed a virtually identical motion which this Court denied on January 17, 1958, holding itself to be without jurisdiction "In the absence of contempt proceedings" (251 F. 2d 183, 186). Such proceedings have since been

instituted by the issuance of the Court's order to show cause on September 4, 1958, and this motion is in support thereof.

/s/ Thomas J. McDermott, Associate General Counsel, National Labor Relations Board.

Sworn and subscribed to before me this 9th day of October, 1958.

/s/ Russell B. Newlen, Notary Public, District of Columbia.

My Commission expires June 14, 1962.

[fol. 67] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 68] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

RESPONSE TO MOTION FOR DISCOVERY OF OCTOBER 9, 1958—Filed October 21, 1958

I

Respondent moves that the motion referred to in the caption be overruled and dismissed because it says no matter of complaint against it and no claim on which relief can be granted are stated in said motion or in the affidavit filed for the purpose of supporting the motion.

II.

1. Respondent adopts the allegations of its motion and answer filed herein in response to the petition for adjudication in civil contempt and the allegations of its answers and responses heretofore filed herein when the motion

for discovery, inspections and depositions were made in the 1953 case and in the 1957 case decided in January, 1958.

2. It adopts and refers to all evidence heretofore introduced and considered in the form of affidavits and exhibits [fol. 69] introduced by it on the prior motions referred to above.

3. It adopts and refers to evidence heard in the United States District Court and appearing in the transcript filed in this Court in the case of *Deena Products v. United Brick & Clay Workers*, 195 F. 2d 612, No. 11,404, said evidence being referred to by pages of the record in its answer in the contempt proceeding.

III

The allegations of the affidavit filed in support of the motion are redundant and repetitious and have heretofore been denied in so far as relevant when inaccurate or untrue. In so far as respondent believes it necessary to repeat such denials, it states that it is untrue and it denies that the operations of Artware were conducted in a manner which prevented it from having assets or which prevented compliance with the back-pay provisions of the decrees, or that its assets were siphoned off or transferred to affiliated companies, or that affiliated companies were *alter egos*, agents or successors to Artware within the meaning of the decrees, or that George H. Weiner and the affiliated companies are subject to the back-pay provisions of the decrees or responsible for failure to comply with them or liable for payment of said back pay. All of the events and occurrences from which the Court is asked to make the inferences, which are denied above, occurred prior to the entry of any decrees of this Court and specifically of the decree of December 16, 1955, [fol. 70] directing for the first time the payment of specific sums of money to named individuals.

It admits that the several corporations, repeatedly referred to in the affidavit, are subsidiaries of Deena Products Company; that Weiner owns a controlling interest in the stock of the parent company and is president of the parent company and the subsidiaries. At times the wife and son of said Weiner have been directors and officers of the

parent and subsidiary corporations. At other times this has not been true, and the allegations are immaterial. The allegations of 4 (b) of the affidavit are only partly true as indicated by responses adopted. It is denied that the subsidiary corporations were organized by Weiner and his parent company solely to serve the purposes or ends of the parent company as directed by Weiner; that they do not engage in any business independently of the parent company or that they have no customers other than the parent company or other subsidiaries. As heretofore alleged, Artware did not always sell its entire output either to Arlington or the parent company. If upon any occasion the parent company paid Artware's obligations with its own check or combined payments for their separate obligations in the same check, proper charges were made against Artware so long as it was operating or had any assets against which charges could be made. It is denied that the parent company fixed or determined the prices it paid to Artware except in so far as a buyer by its agreement fixes the prices of a manufacturer in normal business [fol. 71] transactions. It is denied that such prices bore no realistic relation to costs or profit margin or fair value. Such prices were of necessity obtained and paid at a time which was immaterial because prior to the decree of December 16, 1955.

It again denies that Weiner, through the parent company or its subsidiaries, siphoned off assets and properties of Artware during the prolonged litigation in this case. The litigation between Artware on the one hand and the Board and the unions on the other has been in progress for more than ten years. The events occurring during the greater part of this period are immaterial for reasons heretofore and hereinafter stated. The allegations that between 1948 and 1953 the parent company manipulated prices and fixed prices paid Artware at less than fair value of products or so as to show an operating loss by Artware, or that it diverted orders for pottery to other subsidiaries are denied. These allegations are immaterial (1) because the events are alleged to have taken place between 1948 and 1953, and (2) because there is no impropriety, certainly no contempt of court, in placing orders with other subsidiaries. All the allegations of 5 (c), that assets and pro-

series of Artware and services of employees of Artware were transferred and rendered to the parent company without adequate compensation are denied. It is denied that materials and services intended for use by Artware in the construction of a new plant at Paducah were transferred to and used in construction of a plant at Arlington, Kentucky, without compensation to Artware. The facts relative to these transfers were fully explored and developed in [fol. 72] the sworn testimony of the Auditor Harry Appleman, to which reference was made in the answer in the contempt proceeding. The allegations as to the transfer of the property of Artware to Products in satisfaction of its indebtedness and the subsequent transfer of the property to Industrial are substantially correct. It is true that after an unsuccessful effort to sell it, Industrial has leased the property to Sippi and that Sippi uses it in its business. It is untrue that "the enterprise" continues to operate in the same manner as before as alleged.

It is denied that petitioner seeks an examination of books, records, documents and witnesses in order to show the facts alleged in the affidavit or to prove that Artware, its officers or agents, or its *alter egos* or successors or assigns have failed to comply with any decrees of this Court, or that the financial inability of respondent to pay is the result of improper actions. It states that the Board and the unions are fully informed about the facts, that no discovery remedies are required, and that the real purpose of the Board and the unions is to punish and harass the respondent and its officers.

IV

The affidavit and motion for discovery show that petitioner seeks to examine all types of books, records and statements of Artware, Products and other subsidiaries for the period beginning April 5, 1948. Though the litigation between Artware on the one [fol. 73] hand and the Board and the unions on the other began in 1948, it was not pending in April, 1948, and any facts developed from books and records at that time would be immaterial for the following reasons:

1. Respondent is charged with contempt on account of failure to comply with the decree of this Court. The decree

of this Court was not rendered until December 16, 1[illegible]. Events occurring more than seven years before the decree are not material.

2. The subsidiary corporations which had been organized in 1948 or prior thereto were not organized to engage in litigation with the unions and the Board, and their records prior to the beginning of such litigation or the making of charges against Artware are irrelevant.

3. There is no such charges as contempt of the Board.

4. Respondent was not required to anticipate rulings against it, even by the Board, and could not be guilty of contempt on account of failure to obey decrees not yet entered in litigation which was being contested in good faith.

V

The particularity with which allegations have been set forth and repeated in proceedings beginning with the 1[illegible] case show that petitioner does not need the discovery remedy and is not seeking discovery but, on the contrary, is seeking to harass and punish respondent.

[fol. 74]

VI

Though respondent states that the events of the years long antedating the decree are immaterial, it states that the Board and the unions are not in a position to complain of that which was brought about by the unlawful secondary boycott of the union. This unlawful secondary boycott forced respondent to abandon its plan for an integrated single operation at Paducah. As indicated by the evidence in No. 11,404, and in the action against the unions in which judgment was recovered, *198 F. 2d 637*, the single operation at Paducah was preferable and the operation through subsidiaries located elsewhere, made necessary by the secondary boycott, was more costly. Such method of operation was resorted to for the legitimate purpose of minimizing losses and not for the purpose of avoiding compliance with any decree of this Court entered several years later. Such decree was not and could not be anticipated several years before it was rendered, or while the events resulting in the decree were being litigated in good faith

VII

In the 1953 case this Court strongly intimated and in fact pointed out to petitioner that if it desired to investigate the management of respondent and events that transpired during the period in which it appears to be interested, there were available common law and statutory remedies in courts of original jurisdiction for the protection of the interest of petitioner and those on whose behalf it is acting.

[fol. 75] The admonition of the Court was repeated and quoted in the 1957 case decided in January, 1958, *251 F. 2d 18*. After repeating the admonition the Court said, "We consider that to be the law of this case." Petitioner has persistently disregarded and is now disregarding the advice and admonition of the Court and the law of this case.

If it should follow the law of this case and conform to the advice of the Court instead of disregarding it, it would have available to it in a District Court not only the facilities of a trial court, but the discovery remedies of the Rules of Civil Procedure.

Wherefore, respondent prays that the motion be overruled and dismissed and it recover its costs, and it prays for all proper relief.

James G. Wheeler, C of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Respondent.

[fol. 76] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

MEMORANDUM OF RESPONDENT ON MOTION OF OCTOBER 9, 1958, FOR DISCOVERY—Filed October 21, 1958

Statement

We desire to avoid a repetition of arguments heretofore presented, though in connection with the motion for discovery we are confronted for the fourth time with charges

and statements which have been repeated and repeatedly ruled on.

It appears to us from the pending motion that the effort to have respondent and others punished for contempt has been abandoned. Petitioner has now returned to the position taken in the 1953 case and the 1957 case, claiming that its case is stronger because it asks for a contempt order, even though the request was without merit.

When Is It Claimed Respondent Was in Contempt?

Whether the contempt charge was made in good faith or offered as a front to another effort to examine books and records of respondent and others, the charge is material because unless Artware has been rendered insol- [fol. 77] vent by contemptuous conduct, no discovery is proper against it or other subsidiaries of the parent company.

We pointed out in our response to the motion and in our answer to the contempt petition, which has been adopted, that all of the events complained of and all of the records sought to be investigated bear dates showing that they are immaterial. The argument that these events or these records are background appears to be unsound. Where a party is charged with failure to bargain or with hostility to or discrimination against a union, historic data may shed some light upon events. Evidence of acts of violence in the past may be material in connection with current threats or hostile acts. This is obviously distinguishable from evidence to be considered on a contempt charge, the charge being disobedience in one respect of the decree of the Court.

It will be noted that in affidavits and often repeated statements petitioner constantly refers to events in 1948 and records then made. Its purpose to re-hash the cause and events of that stage of this litigation is clear. Our position is that it is immaterial.

The costly steps of the early rounds of the controversy are known and it is not necessary to repeat them. It is charged that the subsidiary corporations were organized for the purpose of engaging in controversies with the Board and the unions. Most of them were organized be-

[fol. 78] fore there was any such controversy. When the litigation began respondent had a right to resist in good faith the charges of the Board. It was not required as a matter of law to anticipate that the Board would reject its evidence and accept the evidence of its adversaries. It not only believed it had been wronged by a secondary boycott, but it succeeded in establishing its position before an impartial court and obtained a judgment. How was it possible for respondent to be in contempt by virtue of its conduct in 1948? When is it contended respondent began to be in contempt? Assuming for the purpose of argument that petitioner should be given the right to go through books and records of the parent company and its subsidiaries, would evidence and records of events in 1948 be admissible? Respondent's position would of course be that all such evidence was immaterial and should not be disclosed and that questions about it should not be answered because it long antedated the decree. It would certainly be necessary for this Court or a District Court to set a limit on the period over which the punitive exploration of the petitioner would extend.

This leads us to a restatement of our position, that respondent could not be in contempt of a decree not yet rendered; that it is not charged with contempt of the Board and that the Board is attempting to pursue here an improper remedy.

In the case of *N. L. R. B. v. Red River Lumber Company*, 149 F. (2d) 157, the Court of Appeals of the Ninth Circuit considered questions raised in a contempt proceeding [fol. 79] against an employer for alleged violation of a court order. We quote from the syllabus:

> "In contempt proceeding by National Labor Relations Board for employer's alleged violation of court order requiring reinstatement of employee and payment for loss of wages, petition and employee's affidavit, showing that employee refused reinstatement before court order was issued and was paid back pay to date of settlement, did not show 'contempt,' where orders of board and court did not fix amount to be paid employee or specify job to be offered or rate of pay he had received other than by reference to his

former job and pay. National Labor Relations Act, Par. 7, 29 USCA, Par. 157."

The following quotation from the opinion seems to be in point:

"The reply affidavits filed herein on behalf of the respondent are very elaborate and detailed and show that the petitioner was fully advised by reports from the respondent as to the amount paid by respondent to Yorton and that a willingness was expressed by respondent to reconsider the question of compensation to be paid Yorton if in the opinion of the Board it was desirable. Without taking into consideration the reply affidavits of the respondent, which fully explain the situation, it is sufficient to say that the petition of the Board, supported by the affidavit of Yorton, fails to show noncompliance with the order of court *of February 6, 1939, which was made after the settlement between the respondent company and Earl Yorton had been effected.* The order should not be construed as directing payment of a claim already settled, unless specific directions were made therein for the reopening of the settlement. So construed there was not disobedience of the court's order in failing to pay an additional amount claimed by Yorton. "With reference to the foregoing matters, the petition does not show that the respondent has been guilty of contempt."

Affiliated Companies

The constant reference to the parent company and subsidiary companies and George Weiner as *alter ego* should not be allowed to cloud the issue. Nothing has been al- [fol. 80] leged in connection with the organization or operation of these corporations which is improper. No charges were made against any of these corporations in this proceeding (the Board at one time did take action against Deena Products, and quotes, improperly, with from evidence in that proceeding). None of the *alter egos* had reason to anticipate the unhappy events of 1948. Respondent having obtained a judgment to compensate it for a wrongful secondary boycott was not required a

a matter of law to anticipate that the Board would reach and sustain a contrary conclusion as to these occurrences. At a later date, even after the Board had ruled against it, it was not required as a matter of law to anticipate that an enormous back-pay charge would be entered against it and that all of its efforts and evidence in connection with that charge would accomplish nothing. When at one stage in the advertisement of its success the Board and the union announced through the press and to this Court that the back pay would amount to approximately $100,000.00, it had not reason to anticipate that it would later be raised to $300,000.00.

If the acts of the respondent and affiliated corporations in organizing subsidiaries and transacting business through them after respondent's ambitious plans for its Paducah plant were thwarted by the activities of the unions were lawful and proper, they cannot be linked up with alleged contemptuous conduct in failing to comply with a decree of [fol. 81] a Court to be entered many years later by the vague charge that they were the *alter ego* of Artware. We have cited authority in support of the proposition that a judgment for contempt should be supported by clear and convincing evidence. The application of that rule was made in connection with the organization of new affiliated corporations in *National Labor Relations Board v. Tenda Garment Co.*, 102 F. 2d 60. The effort of the Board to have three new corporations adjudged successors of a dissolved corporation was disallowed. The case is a stronger case for the "successor" theory than the case at bar. There is no allegation which would support a charge that any of the corporations involved is a successor to Artware. Its property was transferred in satisfaction of a debt largely exceeding its value. After the plant had been conveyed to a real estate company and unsuccessful efforts had been made to sell it, it was leased to Sippi. These events do not make Sippi a successor to Artware.

Discovery Not Needed

As we have heretofore stated, petitioner's charges and affidavits show its familiarity with events and raise a question as to the genuineness of its motions for discovery. A somewhat similar situation appears to have been pre-

sented in *N. L. R. B.* v. *Red River Lumber Co.*, 167 F. 157, in which the Court said that the affidavits filed in disclosed the diverse views of the parties and that [fol. 82] case could well be submitted on the affidavits except for the request of the Board that it be given time present further evidence. In any event, the evidence sought would be incompetent.

The discovery is unnecessary for the further reason that there has never been any deception or concealment in connection with the activities referred to. There was nothing unlawful or improper in the intercorporate relationship and nothing to conceal. Certainly Products was not required as a stockholder or a parent corporation to put money into Artware after Artware had been impoverished by the events which transpired in the early stages of the controversy. If there had been such a requirement, the failure to invest more money took place years before the entry of a decree.

Improper Remedy

In our response to this motion we have pointed out that the Board has persistently disregarded the admonitions of this Court. In this prolonged litigation no authority is more pertinent than the opinions of this Court in considering the same question. We quote from the opinion in the 1953 case and repeated in the 1957 case, decided in January, 1958:

> "We repeat: 'If one creditor is improperly or fraudulently obtaining an advantage over another creditor there are available to the complaining creditor certain law or statutory remedies in courts of original jurisdiction, independent of equitable action by this Court [fol. 83] for the protection of his interest. The questions involved in controversies between creditors of the same debtor who has insufficient assets to pay his creditors in full are both factual and legal, and the factual side usually require the taking of proof and the facilities of a trial court. The Board should avail itself of such remedies and facilities for the enforcement or protection of its claim before attempting to invoke the equitable jurisdiction of this Court to

that purpose.' See cases cited in support. We consider that to be the law of this case. Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., 89 U. S. App. D. C. 171, 193 F. 2d 666, 669; United States v. Wainer, 7 Cir., 240 F. 2d 595, 596."

Petitioner apparently will not follow the course outlined by this Court because it seeks to punish rather than to investigate. Artware has done nothing for which it should be punished. Inability to pay is not contempt of this Court.

Respectfully submitted, James G. Wheeler, C of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorneys for Respondent.

[fol. 84] MINUTE ENTRY OF ARGUMENT AND SUBMISSION — October 22, 1958

(Omitted in printing)

[fol. 85] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

[Title omitted]

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS THE PETITION FOR CONTEMPT ADJUDICATION AND IN SUPPORT OF MOTION FOR DISCOVERY AND INSPECTION AND DEPOSITIONS UPON ORAL EXAMINATION — Filed November 6, 1958.

This memorandum is submitted in accordance with the understanding had at the oral argument before this Court on October 22. It is designed: (1) to offer alternative procedures and methods by which the factual issues involved in this civil contempt proceeding, properly instituted before this Court to secure compliance with prior decrees of this Court, may be tried and determined; and (2) to reply to

respondent's response to, and memorandum on, petitioner's motion for discovery and inspection and depositions upon oral examination.

(1) Alternative Procedures and Methods for Determination of the Factual Issues Involved in this Civil Contempt Proceeding

At the present state of this proceeding, the case is before the Court upon respondent's motion to dismiss the petition for adjudication in civil contempt. Should the issue of the legal sufficiency of the petition be resolved in petitioner's favor, the Court must then decide whether petitioner's motion for discovery and inspection and the taking of depositions upon oral examination should be granted.

From the petition and answer, it is apparent that material issues of fact exist, thus indicating the need for a trial. If, however, the Court should grant petitioner's motion for discovery, inspection and depositions, the posture of the case could well change substantially. The Board would be enabled to show the facts, alleged in its petition in large [fol. 86] part solely upon information and belief,[1] by probative evidence and thereby prove that Artware, its officers and agents, and its *alter egos* or successors and assigns, have failed to comply with the decrees of this Court of July 30, 1952 (198 F. 2d 645) and December 16, 1955 (228 F. 2d 871), and that within the meaning of said decrees and the opinion of this Court rendered herein on November 10, 1953 (207 F. 2d 798, 802), any alleged "financial inability on the part of respondent to pay the awards is not the result of improper actions on its part in the meantime." By the utilization of the discovery procedures requested in the pending motion, the factual issues which divide the parties would be narrowed and clarified. Indeed the evidence thus adduced might so clearly sustain charges of civil contempt that a trial of the issues would be unnecessary. Cf. *West Texas Utilities Co.* v. *NLRB*, 206 F. 2d 442, 444 (C.A.D.C.). If such should be the case, the Court

[1] The Board requested permission from Artware's attorney to examine relevant books, records, and documents in the custody, possession, and control of Artware, its parent company, and its affiliates, but permission was refused

would have no occasion to examine alternative procedures and methods for determining factual issues involved in this proceeding.

However, on the assumption that the results of discovery will not prove so far-reaching, the Board desires to set forth for the benefit of the Court various means for resolving whatever factual issues remain following discovery. The Board recognizes that its suggestions along these lines are not exhaustive but it offers the following alternative procedures in the hope that they will be of service to the Court.

There is authority to the effect that a court in a contempt proceeding may return the case to the Board "to take testimony and make findings on the primary and controlling factual issue raised in the contempt proceeding. *NLRB* v. *Retail Clerks International Ass'n.*, 203 F. 2d 165, 167 (C.A. 9). The Court in that case confessed that it might have [fol. 87] decided the contempt charge on the basis of affidavits submitted or might have referred the case to a Special Master. And it agreed that reference to the Board was not a usual procedure, and that findings of the Board in the supplementary proceeding before it should in any case be accepted with caution. With these reservations, however, the Court was of the opinion that the general rule that the Board should have no part in a contempt proceeding should be subject to some flexibility. To the arguments that the courts should retain complete power over the policing of their own decrees and that reference to the Board in a contempt proceeding would in effect be entrusting to the Board the enforcement of its own order, the Court made this telling reply *(id.* at 168, n. 2):

> . . . the power to punish remains with this court and it is not to be anticipated that this court will surrender its independence in exercising this power to the Board, even though the making of a record on the question involved and the determination in the first instance is delegated to the Board. It is also suggested that this court is bound to follow the findings of the Board where sustained by substantial evidence on the whole record. But the court could not be so bound in a contempt proceeding.

The issue involved in the case was whether location managers were "supervisory employees" within the meaning of the court's decree, and this was the single fact question involved in the reference to the Board. The Board ordered a hearing with all parties represented before a Trial Examiner, who issued an Intermediate Report on the particular finding of fact, which finding was adopted by the Board and the Court. Such an issue, the Court felt, was "one with which the Board is eminently equipped and qualified to deal." It is true that the issues involved in the instant proceeding are more intricate and broader than that in the *Retail Clerks* case, nor could the Board or the Trial Examiner claim any special qualifications in dealing with such matters. But, keeping in mind that a Court following any such procedure retains its own independence in regard to the power to punish for contempt and in regard to the weight which it will accord to any findings made by such a tribunal, there can be no doubt that such a reference [fol. 88] once back could be an effective means of dealing with the factual issues in the first instance.

An alternative pro[illegible]re utilized by the Court of Appeals for the Fifth [illegible]cuit was a reference to a Trial Examiner of the Board to take testimony without making findings. In a case involving the question whether an association formed by employees was dominated by the employer or was the uncontrolled and uninfluenced choice of the employees, that Court concluded that its order "should be one appointing as examiner a person qualified to take testimony, with authority to arrange for hearings, summon witnesses, keep the hearings within bounds, and without making findings thereon, return the testimony to this court when the investigation is concluded." *N.L.R.B. v. Red Arrow Freight Lines*, 193 F. 2d 979, 981. Such examiner, of course, need not be an employee of the Board at all. He could be selected by the Civil Service Commission from and with the consent of another agency pursuant to Section 11 of the Administrative Procedure Act (60 Stat. 244, 5 U.S.C. 1010).

A further alternative could be the assignment of a District Judge to serve as Special Master. Lest there be any question about the regularity of such a procedure, we submit that a District Judge may be assigned to this Court

in which event, like any other Judge of this Court, he would be subject to such a special assignment.

The most common procedure, however, is the appointment from the roll of attorneys of a Special Master to take evidence with respect to the issues raised and to make findings. At the oral argument herein, it was recognized that this was the customary method but that a possible obstacle resided in the matter of guaranteeing compensation for the Master's services in the event the Board did not prevail on its petition. A similar problem exists in respect to the compensation of a reporter. In order that this method remain open to the Court as a means of resolving the factual issues, the Board is willing to stipulate with respondent either that these expenses shall be borne by the respective parties in equal portions or that the losing party pay all such expenses.

[fol. 89] The Board is of the opinion that any of the above procedures is a proper and effective means for determining the factual issues of this case. It has addressed itself to these various procedures in some detail because it is in full agreement with this Court that the factor of the Court's time, which would be inordinately spent if the Court were obligated to conduct extensive hearings in order to resolve the factual issues, must be given careful consideration. But the Board cannot urge too strongly that it would be at once unfortunate and erroneous if this consideration were permitted to affect the question of the propriety of the former.

As we have already stated, it is the mandate of this Court that the Board seeks to have respected, and it is this Court alone which can compel compliance and respect for its prior orders. This Court itself, in its latest opinion in this case, declared that "if [collection of the awards] is part of the public policy of the Act, the proper procedure would seem to be through contempt proceedings" (251 F. 2d 183, 187).[2] It is this procedure that we are

[2] Respondent's repeated assertion that the Board disregards "the law of the case" in invoking the remedy here sought has reference to page 186 of the opinion just cited (e.g., respondent's memorandum, pp. 7-8). However, respondent utterly ignores the context in which the reference

now pursuing, since, as has been pointed out in our main brief, when the Board petitions for a contempt adjudication for a violation of an enforcement decree, whether involving back pay orders or any other kind of affirmative relief, it is attempting to effectuate those public policies of the National Labor Relations Act which prompted the initial Board Order. It is incidental to the Order that individuals are to be compensated, and it is only incidental to this contempt adjudication that individuals will thereby be benefited. That is not its primary or direct aim. When we come before this Court, we are asking that the Court reaffirm the age-old doctrine that its pronouncements cannot be frustrated or evaded. Even if we were to go before a District Court, we could not ask such a Court to order respect for [fol. 90] a decree of *this* Court. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. Only by the petition for adjudication in contempt before *this* Court may the Board ask that respondent be obliged to comply. Cf. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191, 195.

In the interests of conserving the time and energies of this Court for its other business, the Board points out that various alternative procedures exist whereby this Court may delegate the determination of factual issues herein, but cardinal to any such considerations is the uncontroverted fact that the ultimate instrument for securing respect for this Court's decrees is this Court's own process.

(2) Reply to Respondent's Response to, and Memorandum on, Petitioner's Motion for Discovery and Inspection and Depositions Upon Oral Examination:

Respondent's objections to the discovery motion fall into four general categories, as follows: (a) the events complained of and the records sought antedate the decree of this Court; (b) no case is alleged against Artware's affi-

---

appears. For the sentence immediately preceding that now quoted by respondent makes clear that the Court was not "Eliminating any issue of contempt" which, of course, it cannot do here. The Court made amply clear, both in 207 F. 2d 798, 802 and in 251 F. 2d 183, 184, 185, 186, 187, that the issues there before it were "different" from that now presented.

ates; (c) discovery is not necessary and the Board seeks only to harass respondent; and (d) the Board pursues an improper remedy. It has already been pointed out (p. 5) that a contempt adjudication in this Court is the proper remedy, and so the last contention need not be labored again at this point. But the first three points require comment.

(a) While certain events antedate this Court's decree, they are not for that reason immaterial in the circumstances of this case. In this case respondent, its affiliates and Weiner engaged in a course of conduct both before and after the decree which was designed to deprive Artware of all its assets. They carried out these plans in anticipation of this Court's decrees and for the object of thwarting any such decrees no matter at what time these decrees were issued. Accordingly, this Court, which issued the decrees and which has the responsibility to prevent their frustration and evasion, is entitled to take into consideration events, no matter when they occurred, which clarify the nature and [fol. 94] scope of this scheme. Respondent's course of conduct, paralleling each stage of litigation with progressive liquidation of Artware's assets, demonstrates that Artware, Weiner, Products and its affiliates were carefully anticipating ultimate judicial decrees and preparing to nullify them. Hence, they may not with propriety object to an examination, dating from the filing of charges with the Board, into the corporate complex they deliberately erected in order to render nugatory the remedial orders thereafter issued by the Board and the Court.

Reference in the Board's main brief to the general consideration by courts, including this Court, of "background material" beyond the six month limitations period of Section 10 (b) was designed to illustrate that consideration of earlier materials which could not by themselves establish liability is not unusual for purposes of illuminating subsequent events. In the context of this proceeding, which seeks to prove a concerted plan developed by transactions over a period of years in order to thwart court decrees, examination of the events before 1952, the year in which this Court first issued a decree, as background material, seems both sound and appropriate. Historic data encompassing in this case transactions since 1948 would seem to be as useful and revelant as the consideration of antecedent

facts in the application of an "habitual violator" stat
(see *e.g.*, *Gruger* v. *Burke*, 334 U. S. 728, 732; *Barker*
Morris, 27 LW 2132 (Mo. Sup. Ct., decided Septembe
1958), where a pattern of conduct is the gravamen of
charge. In no other way could the scope of respondent
concerted scheme be effectively revealed.

(b) The petition alleges sufficient facts to war
judication of all of Artware's affiliates. See the Boa
main brief, pp. 12-16. Respondent's reliance in the
nection on *N.L.R.B.* v. *Tupelo Garment Co.*, 122 F.
603 (C.A. 5), is misplaced. The facts in that case w
quite different from those now before the Court. T
was voluntarily dissolved, some of its equipment w
to persons not made parties, and, although substan
[fol. 92] the same business was carried on, some of
shareholders and directors of the newly created co
tions were different. The Court was careful to p
that storage of certain books and records, temporar
of the earlier corporation's name, and utilization of
identical Post Office box number of Tupelo were not
ficient indication of successorship. On the other
the allegations here indicate the continuation of the
same business by a similar integrated enterprise w
same officers, management and supervision. The sh
holders and directors are identical. All that has
is that the work formerly performed by Artware is
done by another department of the same enterpris
the face of these distinctions, *Tupelo* is wholly inapp
Far more pertinent are the cases cited in our open

(c) The Board has carefully followed the di
this Court in its 1958 opinion in this case (251 F. 2d
by instituting contempt proceedings in support of
instant motion for discovery, inspection and depo
made. Twice before the Board sought such disco
in each case was informed that its motion was pr
Now, however, the time is ripe for discovery. By affi
the Board has pointed out to this Court that the fac
which it relies are based on information and belief,
that Artware, Arlington, Sippi, Industrial and
company have refused Board requests to exami
books, records and documents in their custody, pos
or control. The Board's purposes in seeking these

records and documents have been set out in the motion and supporting affidavit.

The aim of the Board is not to harass but to uncover the facts as completely as possible. It asks this Court to avail itself, by analogy, of the modern procedures prevailing in the District Courts. One of the District Courts has pointed to the advantages which these procedures foster:

> [fol. 93] The Federal Rules of Civil Procedure . . . provide radical departures from procedures formerly governing trials of cases. They make provision for full discovery to adversary parties before trial of evidence available to a party litigant . . . Inspection . . . is essential if the parties are to obtain knowledge of the facts and issues before trial. The Government of the United States as a party litigant is entitled to the benefits of the procedures established in the courts. *Soc. Int. Internationale, etc.* v. *McGranery*, 111 F. Supp. 433, 443 (D.C.D.C.), affirmed 243 F. 2d 254 (C.A.D.C.), reversed and remanded on other grounds, 357 U. S. 197.

The Supreme Court has likewise been aware of the salutary character of these discovery methods. It has stated:

> . . . civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.
>
> . . . We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. *Hickman* v. *Taylor*, 329 U. S. 495, 501, 507.

And it is significant that in the very case cited by respondent as presenting a "somewhat similar situation" as that in the instant case, the Court, in its desire to afford full opportunity for development of pertinent facts, *granted* leave to the Board to present further evidence,

despite any doubts it may have entertained as to necessity *NLRB v. Red River Lumber Co.*, 109 F. 2d 157 (C.A. 9). Here the necessity is shown, and the Board looks to this Court for permission to proceed from "the dark" into the light.

Conclusion

Accordingly, petitioner respectfully requests, that respondent's motion to dismiss the petition should be denied, that petitioner's motion for discovery and inspection and [fol. 94] for the taking of depositions should be granted in all respects, and that this Court take into consideration the alternative procedures and methods for determining the factual issues in this case, as hereinabove discussed.

Jerome D. Fenton, General Counsel, Thomas J. McDermott, Associate General Counsel, Louis Schwartz, Assistant General Counsel, Irving M. Herman, Attorney, National Labor Relations Board.

November, 1958.

[fol. 95] [File endorsement omitted]

In United States Court of Appeals for the Sixth Circuit

No. 11,156

[Title omitted]

Memorandum for Respondent in Response to Supplemental Memorandum of Petitioner—Filed November 28, 1958.

It has been correctly stated in petitioner's memorandum that this case is before the Court on respondent's motion to dismiss the petition for adjudication in civil contempt. This of course is the first question before the Court and we refer to it, though it is not our purpose in this brief to supplement our arguments heretofore presented in support of our position that petitioner has not stated grounds for holding that respondent is in contempt of the decree of

this Court entered December 16, 1955. This is necessarily the decree to be considered because in that decree for the first time the amount of back pay was fixed after a hearing by the Board. Until that decree was entered, rulings on back pay were interlocutory. Until that final decree was rendered in December, 1955, respondent could not be guilty of contempt " " " because it is cardinal in that subject that no one shall be punished for the disobedience of an order which does not definitely prescribe what he is to do." *NLRB* v. *New York Merchandise Co.*, 134 F. 2d 949, 2d Cir. [fol. 96] In the above case, which involved a proceeding by NLRB for enforcement of an order, the Court stated definitely that a respondent could not be subject to punishment until back pay was finally fixed and the court had incorporated the amount so fixed into its own order. Since the numerous, repeated allegations set out in affidavits refer almost exclusively to actions and events long prior to the date of the final decree, respondent's position that no grounds for a punishment for contempt are stated seems to be sustained.

As indicated above, however, it is not our purpose to present further argument on this point which we hope we have covered, except for the above citation in the brief heretofore filed. This memorandum will be limited to answering the Board's memorandum as to procedure, supplementing the discussion in oral argument on this point.

I

No Separation Possible Between Discovery and Hearing Evidence on Issues.

In the first part of the memorandum for petitioner, opposing counsel attempts to separate discovery from factual issues. It is argued that if the Court should grant petitioner's motion for discovery, inspection and depositions, the issue might be narrowed and subsequent procedure materially limited or shortened. It appears to us that no such separation is practicable or possible. The factual issues [fol. 97] are sharp and petitioner seeks to obtain from respondent and affiliated companies support for statements its attorney has made under oath which it now says are made in large part solely upon information and belief. In

the first paragraph of the affidavit the affiant states that he is "familiar with the facts herein." It is true that at some point in the long affidavit he states that "he is informed and believes" certain facts. Considered as a whole, however, the affidavit purports to be a statement of facts known to affiant upon the basis of which petitioner asks for discovery, inspection and depositions. As indicated in our briefs heretofore filed, it appears to us that petitioner's counsel have studied the record in these cases and actually have no need for discovery or depositions. At any rate, a piece meal exploration of the issues in this matter is not possible.

II

The Suggested "Alternative Procedures"

A consideration of the several procedures suggested by petitioner indicates that they are not practicable or suitable. We will discuss them in the order in which they are discussed in petitioner's memorandum:

(a) *Returning the Case to the Board.* When it was suggested in oral argument that a question dealing exclusively with contempt of a decree be referred to the Board, the complaining party, it appeared that it did not merit serious consideration. The position of the Board [fol. 98] is such that it could not be expected to give impartial consideration to facts developed in connection with a charge of contempt. The writer of petitioner's memorandum refers to the case of *NLRB* v. *Retail Clerks International Ass'n*, 201 F. 2d 165, from the 9th Circuit, but frankly and fairly states that the case is not in point. The Retail Clerks case dealt with two questions, as to both of which the law peculiarly applicable to labor relations applies. These questions dealt with failure to bargain and who are supervisors. The Court commented on the fact that these were questions peculiarly within the jurisdiction and province of NLRB, and opposing counsel is fair enough to point out that these issues differ materially from those submitted in this case. In making the reference in the Retail Clerks case, the Court of Appeals pointed out that such a reference was unusual and cited several cases in which it had been held that it would be improper. Nothing is offered in the brief which would cause the Court to modify

its prompt rejection of the suggestion made in oral argument that factual issues dealing with contempt be referred to the Board or to an examiner or to any representative of the Board.

(b) *Reference to a Trial Examiner.* The same vice is inherent in a reference to a trial examiner of the Board. Whether he be technically employed by the Board or not, such examiner would be for practical purposes a representative of the complaining party. His ruling on any [fol. 99] question in controversy could not be impartial or fair.

The suggestion that such an examiner might take testimony without making any findings is no answer to the objections to such procedure. A vital part of the fact-finding function of any court, special master, or examiner is seeing and hearing the witnesses and reaching a conclusion as to their credibility. It is not desirable that the court be called upon to reach conclusions of fact and substitute itself for a trial examiner without having the benefit of observing the witnesses. An equally serious objection in this case would be permitting such an examiner to rule on questions of admissibility of evidence. Such rulings, for example, on the admissibility of evidence of events in 1948, several years before the entry of the decree, would involve much time and expense and might require frequent recourse of the Court for rulings. Since it definitely appears that a trial examiner of the Board could not be expected to be impartial, it appears to be unnecessary to give further consideration to this question.

In the case of *NLRB* v. *Red Arrow Freight Lines*, 193 F. (2d) 999, from the 5th Circuit, referred to in petitioner's memorandum, we have another case in which, as opposing counsel frankly admits, the question involved was peculiarly within the scope of labor law. This basic question was whether an association, formed by employees of the appellee, was dominated by the employer. The action of the court in referring this labor law question to an examiner with instructions to report back offers no solution of the [fol. 100] problems presented here. It would be wholly impractical to make any such reference in connection with the complicated and controversial issues involved on this motion.

(c) *Assignment of District Judge as Special Master.* It seemed to be understood and conceded in oral argument that in the event that the court should hold that a contempt case had been stated and should make an order of reference of all of the issues to a special master, the hearing of evidence would consume several months. This would seem to dispose of the possibility of appointing a District Judge special master. We know of no District Judges whose dockets are in such condition that they could assume such burdensome task. We have heretofore argued, and need not repeat the argument, that the real issue involved should be submitted to a District Court in a proper proceeding, as suggested twice in the opinions of this Court.

(d) *Reference to an Attorney as Special Master and Stipulation that Each Party Pay One-Half of Costs.* This suggestion may have come from the last paragraph of the opinion in the Red Arrow Freight Line case, 192 F. 2d 979, referred to above. The suggestion offers no solution here. We would not be willing to stipulate for an insolvent respondent that it would obligate itself to pay any part of a cost bill which would necessarily be large. It was indicated in oral argument that the Board would not be in a position to pay any part of such costs. We do not know [fol. 101] how the matter was handled by the Board in the Red Arrow case. Obviously there can be no stipulation here.

This proceeding by the Board is an effort to collect a judgment in favor of 56 persons in varying amounts, aggregating $300,000.00. Any effort to disguise it as "carrying out the purpose of the Act" is mere window dressing and arguments based on this idea do not ring true.

The only substantial issue is whether the indebtedness of Artware to Products was real or sham, and whether the payment of that indebtedness by a transfer of all of Artware's property was an unlawful or avoidable preference. This makes this Court's repeated suggestion that petitioner proceed in the District Court reasonable and practical. No question of contempt is involved since the note and mortgage were executed by Artware long before the decree of this Court, and the preference of the parent company as a creditor, if there was an improper preference, is not contempt of this Court. Again we repeat that

execution of a note and mortgage in 1949 could not be in contempt of a decree entered in December, 1955. If petitioner genuinely desires more information as to steps taken in 1948 and 1949, it should not attempt to obtain this information in connection with a charge of contempt of a decree entered in December, 1955. This may be an added reason why the suggestion of this Court as to proper procedure should be followed.

Respondent therefore requests that its motion to dismiss [fol. 102] the petition be sustained and that the alternative procedures suggested by the petitioner be rejected as inapplicable.

James G. Wheeler, C of Wheeler & Marshall, 901-6 Citizens Bank & Trust Bldg., Paducah, Kentucky, Attorney for Respondent.

[fol. 103] In United States Court of Appeals for the Sixth Circuit

No. 11,156

National Labor Relations Board, Petitioner,

vs.

Deena Artware, Incorporated, Respondent

Order—December 13, 1958

Before: Martin and Miller, Circuit Judges, and Jones, District Judge.

This cause came on to be heard on the petition of the National Labor Relations Board for adjudication in civil contempt and for other civil relief.

On consideration whereof, the Board's motion for discovery and inspection and depositions upon oral examination is denied.

The motions of the respondents to dismiss the Board's petition for adjudication in civil contempt are sustained.

Approved for entry:

Shackelford Miller, Jr., United States Circuit Judge.

[fol. 104] Opinion (Filed December 13, 1958)

In United States Court of Appeals for the Sixth Circuit

No. 11,156

National Labor Relations Board, Petitioner,

v.

Deena Artware, Incorporated, Respondent

On Petition for Adjudication in Civil Contempt and for Other Civil Relief

Opinion—Decided December 13, 1958

Before: Martin and Miller, Circuit Judges, and Jones, District Judge

Miller, Circuit Judge. The National Labor Relations Board has petitioned this Court to adjudge in civil contempt of this Court the respondent, Deena Artware, Incorporated, hereinafter referred to as Artware, its president and agent George H. Weiner, and four other corporations who are affiliated with Artware as hereinafter set out, for resisting, disobeying and violating, and refusing to comply with the decree of this Court entered herein on July 30, 1952, and the supplemental decree entered herein on December 16, 1955.

This is the fifth time this case has been before us. Our previous opinions, to which reference is made, give in detail the factual background and history of the litigation. For our present purposes, we will restate only such of the facts as are necessary to present the issue now under consideration.

On July 30, 1952, this Court entered its decree in the case enforcing an order of the Board issued on October [fol. 105] 25, 1949, against respondent Artware, directing, *inter alia*, that Artware, its officers, agents, successors and assigns make whole certain named employees for any loss in pay they may have suffered by reason of respondent's discrimination against them in refusing to reinstate them following the termination of a strike, in violation of the

National Labor Relations Act. *N. L. R. B. v. Deena Artware, Inc.*, 198 F. (2) 645, C. A. 6th, cert. denied, 345 U. S. 906. The case was remanded to the Board for the purpose of hearings and findings as to the amounts due the individual employees.

On November 10, 1953, this Court denied motions of the Board to enjoin Artware and its president Weiner from assigning to Deena Products Co., its parent corporation, in part payment of an alleged indebtedness owing by Artware to Deena Product- Co., the unpaid portion of a substantial judgment which Artware had recovered against United Brick & Clay Workers and the American Federation of Labor as damages resulting from an illegal secondary boycott. *N. L. R. B. v. Deena Artware, Inc.*, 207 F. (2) 798, C. A. 6th; *United Brick & Clay Workers v. Deena Artware, Inc.*, 198 F. (2) 637, C. A. 6th, cert. denied, 344 U. S. 895. The principal ground for this ruling was that the amounts due the employees whose claims the Board was attempting to protect against dissipation of Artware's assets were unliquidated. It was also pointed out in that opinion that since the claims were unliquidated, this Court would not treat the assignment by Artware of its assets as being in contempt of this Court's previous order to make whole the employees it had illegally discharged.

Following the remand of the case to the Board, the Board held hearings and issued its supplemental decision and order directing payments in specific amounts to designated individual employees, which totaled approximately $300,000.00. On December 16, 1955, this Court entered its supplemental decree enforcing the supplemental decision and order of the Board, the effect of which was to liquidate the amounts which Artware was ordered to pay to its individual employees. *N. L. R. B. v. Deena Artware, Inc.*, 228 F. (2) 871, C. A. 6th.

Artware did not make the payments so ordered. It contended then, as it does now, that it was forced by economic conditions and the labor dispute involved in this litigation to discontinue the operation of its plant in Paducah, Kentucky, during the year 1953; that it was financially unable [fol. 106] to make the payments; that there were no assets available for that purpose; and that whatever assets were previously available for creditors had through bona fide

business transactions been used in the payment, or to secure the payment, of its legal obligations. The Board contends then, as it does now, that Artware and the several affiliated corporations were integral parts of a single enterprise, substantially owned and controlled by Weiner; that the operations of Artware were conducted in a manner which prevented it from having assets, and thereby prevented compliance with the back pay provisions of the decree; that Artware's assets were siphoned off or transferred to affiliated companies, in consequence of which Artware was left with no assets with which to comply with the decree; that the affiliated corporations were *alter egos* and or successors to Artware within the meaning of the decrees; and that Artware and the affiliated corporations were subject to the back pay provisions of the decree and responsible for the failure to comply therewith, and liable for payment of said back pay. The Board filed a motion that Artware and the several affiliated corporations be directed to produce and permit the Board to inspect, copy and photograph numerous books, records, bank statements and various types of papers and documents which would show the financial condition of Artware and the respective obligations and credits rendered between Artware and the affiliated corporations. It also asked that certain present or former officers of Artware and the affiliated corporations be directed to give depositions with respect to the financial ability of Artware to comply with the provisions of the supplemental decree and the dealings and relationship of Artware with said affiliated corporations. The motions were not in support of any contempt proceedings. For that reason this Court, with one judge dissenting, ruled on January 17, 1958, that the motions were premature and that such discovery proceedings would not be authorized or ordered in the absence of contempt proceedings, the validity of which, as a matter of law, should be first passed upon by this Court. *N. L. R. B.* v. *Deena Artware, Inc.*, 251 F. (2) 183, C. A. 6th.

On August 20, 1958, the Board filed the present petition for adjudication in civil contempt. It has also filed a motion, in substantially the same form as previously filed, for discovery and inspection of documents of Artware and the four affiliated corporations and for an order directing

[fol. 107] that depositions be taken of present or former officers of the five affiliated corporations.

The petition for adjudication in civil contempt names the five affiliated corporations as being Deena Products Company, Inc., hereinafter called Products, an Illinois corporation maintaining plants and its principal office in Chicago, Illinois, which is the parent corporation, and its four subsidiaries, namely, Artware, Deena of Arlington, Inc. hereinafter called Arlington, Sippi Products Company, Inc. hereinafter called Sippi, and Industrial Realty Company, Inc., hereinafter called Industrial. It alleges that at all times material herein, Weiner has owned all the shares of stock of Products except for the minimum shares required by directors to qualify for office; that Products has owned all the shares of stock of the four subsidiaries except for the minimum shares required by directors to qualify for office; that the officers and directors of Products and of the subsidiaries have been Weiner, his wife, his son, and whoever has been employed as Weiner's personal office secretary; that Weiner has been president and treasurer of Products and each of the subsidiaries and has actively directed and controlled the financial and business operations of Products and the subsidiaries; that Products and the subsidiaries have constituted and have been operated as a single enterprise, engaged in the manufacture, sale and distribution of lamps, with each of said corporations performing a particular function, as a department or division of one enterprise in the manufacture, sale and distribution of the common product; and that Products and Weiner, through and together with Arlington, Sippi and Industrial, have caused the affairs and business of Artware to be conducted in a manner which divested Artware of its assets during the litigation herein for the purposes of preventing and frustrating compliance with the Court's decrees.

Allegations of detailed facts are made in support of these general contentions. Of major importance are the following. Special attention is directed to the specific dates. (1) About March, 1949, following the hearings before the Board, Products and Weiner in the exercise of their control over the price which Products paid Artware for the lamps which Artware manufactured and sold exclusively to

Products, reduced such price despite added operations and increased costs, and required Artware to continue to sell and deliver its entire output to Products and or Arlington [fol. 108] at prices which did not constitute adequate or proper consideration or value for such products or permit Artware to show a fair return. In consequence thereof Artware showed losses from its operations, although Products made substantial profits on the sale of the completed product. (2) About October 31, 1949, a few days after the issuance of the Board's decision and order of October 27, 1949, Products and Weiner caused Artware to execute mortgages on all of its real and personal property, allegedly to secure the payment of a promissory note, executed at the same time, undertaking to pay Products $75,459.65 within five years from the date thereof, with 6 per cent interest payable semi-annually; that about September 19, 1952, Products and Weiner caused Artware to execute further mortgages on said real and personal property, allegedly to secure payment of a three-year promissory note for $5,797.74 with interest at 6 per cent payable semi-annually; that about December 16, 1952, Products and Weiner caused Artware to make to Products a partial assignment of the proceeds of a judgment in the amount of $29,985.85 which Artware had recovered against the United Brick & Clay Workers of America and the American Federation of Labor, allegedly as security in addition to the mortgages referred to above, and that by reason of said assignment Products received on or about January 22, 1953, the sum of $19,320.97. (3) That about April 24, 1953, Products and Weiner caused Artware to cease all operations and thereafter until about November 24, 1954, Sippi and Products, without payment, used Artware's plant, facilities and properties at Paducah. (4) About November 24, 1954, Products and Weiner caused Artware to convey to Products title to all its property, including its real estate, factory, equipment, machinery, inventory, money and other assets, allegedly in payment of Artware's purported indebtedness in the total amount of $105,000.00, secured by mortgages hereinabove referred to, leaving as Artware's sole unsatisfied obligation the back pay due under the decrees herein, and that Artware has engaged in no business activities since the transfer of its property; that about May 4, 1955,

Products and Weiner conveyed the plant with its equipment, machinery and other contents, formerly owned and operated by Artware, and its other real estate, to a newly organized corporation, namely, the subsidiary, Industrial which subsidiary continues to hold the legal title to such properties. The petition also alleges that Artware's al- [fol. 109] leged indebtedness to Products, to secure which the mortgages and assignments were executed, was not a true and valid indebtedness, nor was it due or owing by Artware to Products, nor were the notes, mortgages and assignments executed for adequate consideration, but were in fact executed for the purpose of evading payment of the sums due under the decrees herein, and that as a result of the conduct above described, Weiner, Products, Arlington, Sippi and Industrial so manipulated the business of Artware as to prevent Artware from accumulating any cash or other assets with which to comply with the decrees herein, the object thereof being to thwart and frustrate compliance with said decrees. The petition contends that by reason of the foregoing acts, Weiner and the five affiliated corporations and each of them are in civil contempt of this Court, prays that they be so adjudged in civil contempt and that they be ordered to purge themselves of such contempt by forthwith paying in full to each of the employees named in the supplemental decree the sum of money therein specified, and that upon failure to do so the Court issue attachments against each of them.

Artware has moved that the petition be dismissed on the ground that no claims on which the requested relief can be granted are stated therein. It has also filed an answer admitting some of the allegations as to corporate existence, stock ownership and officer personnel of the affiliated corporations, the execution of mortgages and the transfer of property by it to Products in satisfaction of its indebtedness to Products, that Artware ceased operations on or about April 24, 1953, and that no payments have been made on the back pay awards. It denied the allegations of fraud or wrongdoing on its part and that the business of Artware was conducted in a manner which was calculated or did divest Artware of its assets during this litigation for the purpose of preventing or frustrating compliance with the Court's decrees. It affirmatively

alleged that the transactions complained of were bona fide business transactions, and that the notes, mortgages, assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given. Weiner and the other affiliated corporations moved that the petition be dismissed for want of jurisdiction, and in the event such motion should be overruled, adopted as their own the allegations of the answer of Artware.

[fol. 110] We accordingly have a large field of factual controversy, including many transactions over a number of years. Hearings on these factual issues could easily take a number of months. The practical problems of how we should conduct these hearings and how the expense thereof was to be met, in view of Artware's lack of assets, were discussed in oral argument. The Board has made a number of suggestions. We have concluded that if a hearing becomes necessary, it should not be farmed out to an administrative agency, but should be conducted by the Court through a Commissioner of its own appointment. *Hall Corp.* v. *N. L. R. B.*, 159 F. (2) 952, 954; C. A. 4th. But before embarking on that procedure and making such provision for the payment of costs, we must consider the allegations of the petition in order to determine whether, as a matter of law, they are sufficient to serve as a basis for contempt proceedings. This is in accordance with the views heretofore expressed by us in *N. L. R. B.* v. *Deena Artware, Inc.*, supra, 251 F. (2) 183, 185-186; C. A. 6th.

It is, of course, settled law that the power to punish for contempt is an inherent power of the Federal Courts and that it includes the power to punish violations of their own orders. *Green* v. *United States*, 356 U. S. 165, 175; *In Re Manufacturers Trading Corp.*, 194 F. (2) 94; C. A. 6th. It is also settled law that this inherent power can be limited by Congress and has so been limited by Sec. 401, Title 18, U. S. Code. *United States* v. *Hall*, 198 F. (2) 726, Note page 728, C. A. 2nd; *Farese* v. *United States*, 209 F. (2) 312, 315, C. A. 1st; *Cammer* v. *United States*, 223 F. (2) 322, 324, C. A. D. C., reversed on other grounds, 350 U. S. 399. Sec. 401 provides: "A court of the United States shall have power to punish by fine or imprison-

at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

In the present case the applicable provision is Subsection 3 of Sec. 401. Under that section the deliberate refusal to comply with a back pay award, when financially able to do so, is contempt of court. *N. L. R. B.* v. *Laufer*, 182 F. (2) 798, C. A. 5th; *N. L. R. B.* v. *Lightner Pub. Corp.*, 128 F. (2) 237, 241, C. A. 7th. See: *Flamina* v. *Warshawsky & Co.*, 123 F. (2) 622, 626, C. A. 7th. Fraud [fol. 111] ulent devices on the part of a respondent, entered into for the purpose of evading the impact of a back pay award, will be disregarded by the court in contempt proceedings for refusal to comply with the court's order. *Parker* v. *United States*, 135 F. (2) 54, 58, C. A. 1st; *N. L. R. B.* v. *Deena Artware, Inc.*, supra, 207 F. (2) 798, 802, C. A. 6th; *N. L. R. B.* v. *Parsons' Punch Corp.*, 249 F. (2) 956, C. A. 6th.

On the other hand, it also appears to be settled law that inability to comply with an order requiring the payment of money resulting from insolvency or other cause not attributable to the fault of the party charged will under ordinary circumstances be a valid defense to contempt proceedings. *In Re Sobel*, 242 F. 487, C. A. 2nd; *Hopkins* v. *United States*, 186 F. (2) 164, 171, C. A. 9th; *United States* v. *Moore*, 117 F. (2) 483, 488, C. A. 6th. It appears to be anticipated in the present case, as shown by the allegations of the Board's petition in this contempt proceeding, that at least since December 16, 1955, the date of the supplemental decree, which liquidated the amounts to be paid to designated employees, Artware has been financially unable to pay the awards, had no assets of any kind, and was in fact out of business. Disregarding for the moment what transpired before that date, it would seem that Artware's failure to reinstate certain employees and to pay the awards for back pay at any time subsequent to December 16, 1955, would not furnish a basis for contempt proceedings. *N. L. R. B.* v. *Carolina Mills, Inc.*, 167 F. (2) 212, 214, C. A. 5th. We think that the answer to our present

problem is restricted to a consideration of what happened prior to that date.

Sec. 401 (3), Title 18, U. S. Code, plainly gives the power of this court to a case of disobedience to its "order, rule, decree, or command." This means an existing order, rule, decree, or command of a respondent *prior* to the entry of the order or judgment which he is charged with disobeying, to constitute contempt of court, regardless of the intention of respondent to avoid the impact of an order thereafter expected by him to be thereafter entered. *Loucks Storage Corp.*, 104 F. (2) 107, C. A. 2nd, dismissed, 308 U. S. 629; *Ex Parte Bodner*, 62 F. (2) 44, 4th; *In re Sixth & Wisconsin Tower*, 108 F. (2) 7th; *Parker v. United States*, 126 F. (2) 370, 5th. We recognize the argument of the Board that [fol. 112] a respondent prior to the entry of the decree should be considered by the Court on the questions of intent and willfulness with respect to later actions in violation of the decree. Such evidence though bearing on the question of intent, does not constitute contempt, and if the respondent attempts "of the court's decree or command does not amount to obedience or resistance" thereto, the argument is not applicable.

In considering this question we must keep in mind the difference between contempt proceedings and other proceedings by which creditors can attack allegedly fraudulent conveyances and transfers by a debtor, which are made with the intent to delay, hinder or defraud creditors, or which constitute a preference by a debtor of one creditor over another. The transactions complained of in the instant case could have been attacked and possibly nullified in proceedings instituted under the provisions of Sections 378.040 and 378.060, Kentucky Revised Statutes. *N. L. R. B. v. Deena Artware, Inc.*, supra, 298 F. (2) 798, 801, C. A. 6th. But the transfers and conveyances complained of in the present case "constituted preferences or conveyances for the purpose of defrauding creditors is not the question presented to us. On the contrary, we have the question of whether the transactions and conveyances

Phelps Dodge Corp. v. *N. L. R. B.*, 313 U. S. 177, 187; *N. L. R. B.* v. *Southern Silk Mills*, 242 F. (2) 695, C. A. 6th; *N. L. R. B.* v. *Bishop*, 228 F. (2) 68, 72, C. A. 9th. Elimination of the position formerly held by a discharged employee because of lack of business can likewise defeat a claim for lost wages. *N. L. R. B.* v. *Lightcap Packing Co.*, supra, 128 F. (2) 237, 241, C. A. 7th; *N. L. R. B.* v. *E. I. DuPont Mfg. Co., Inc.*, 199 F. (2) 631, 634, C. A. 2nd; *Corning Glass Works* v. *N. L. R. B.*, 118 F. (2) 625, 629, C. A. 2nd. See: *N. L. R. B.* v. *American Creosoting Co.*, 194 F. (2) 193, 196, C. A. 6th. Sickness of the discharged employee or inability or unwillingness to work are also factors which have to be considered. See: *N. L. R. B.* v. *Miami Planing Mill Co.*, 224 F. (2) 702, C. A. 4th.

The fixing of the amount of the award for back pay is a function of the Board, not the Court, and at times involves difficult problems, in the solution of which the employee is entitled to be heard. *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U. S. 344, 346. No award which it makes is enforceable until reviewed and approved by the Court. See *Bell Co. and Co. Title 29, U. S. Code*. That contempt of court to refuse to obey the Board's order [fol. 114] tore it has been judicially confirmed. *N. L. R. B.* v. *Express Publishing Co.*, supra, 312 U. S. 426. We are of the opinion that the enforcement order of December 1952, which left undecided and undisposed of the amount of back pay which any individual employee would be entitled to receive, was not sufficiently definite and unambiguous to serve as the basis for contempt proceedings, and that the order which must serve as the basis for such proceedings is the supplemental decree of December 16, 1955. Rulings to the same effect are contained in *N. L. R. B.* v. *Newark Morning Ledger Co.*, 134 F. (2) 949, 952, C. A. 2nd; *Bell Aircraft Corp.* v. *N. L. R. B.*, supra, 159 F. (2) 952, 958, C. A. 4th; and *N. L. R. B.* v. *Bell Oil & Gas Co.*, 99 F. (2) 5th. This is also the view heretofore expressed by this Court in *N. L. R. B.* v. *Decca Artware, Inc.*, supra, 2 (2) 798, 802, C. A. 6th. As shown by the allegations of the Board's petition, the transactions relied upon as the basis for contempt proceedings occurred prior to December 16, 1955.

The Board's motion for discovery and inspection and interrogations upon oral examination is denied.

The motions of the respondents to dismiss the Board's petition for adjudication in civil contempt are sustained.

[1951], Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 116] Respondent's Exhibit A 3

In the District Court of the United States for the Western District of Kentucky

Civil Action No. 477

Deena Artware, Incorporated, Plaintiff,

v.

The United Brick and Clay Workers of America, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the American Federation of Labor, Defendants

Amended and Substituted Complaint

[Filed December 11, 1950]

In order to conform to the proof and the rulings of the Court on the first trial of this action, plaintiff files this its revised and substituted complaint:

Plaintiff states that it is a corporation, organized under the laws of the State of Kentucky; the defendants, the United Brick and Clay Workers of America, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the American Federation of Labor, are labor organizations in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. The defendant, Amer-

ican Federation of Labor, is also an organization of mil
of which its co-defendants, the United Brick and C
Workers of America, and the International Brotherhood
Teamsters, Chauffeurs, Warehousemen and Helpers
America are members. The defendants, the United Br
[fol. 117] and Clay Workers of America and the Inter
tional Brotherhood of Teamsters, Chauffeurs, Warehou
men and Helpers of America, are voluntary associa
and each of them is composed of thousands of
their memberships being so large it would be impracti
to bring their members before the Court within a rea
time. The questions involved are of common or gener
terest to the members of both of said unions. The s
unions and other unions composing the membership
defendant, the American Federation of Labor, are like
composed of many thousands of members; it would be
practicable to bring the membership of said co
unions or the unions themselves, of which, there ar
dreds composing said federation before the court wit
reasonable time, and the questions involved are of co
or general interest to the unions composing said federa
and the membership of said federation and of said

I

Jurisdiction is founded on Title 29, Section 158, U
defining certain unfair labor practices of labor organi
tions or their agents, and Title 29, Section 187, U.S.
making certain boycotts, known as secondary boycotts,
lawful, and giving to anyone injured by reason of
cott a right to sue for damages in any District Court
the United States. Jurisdiction is also founded on div
sity of citizenship. The plaintiff is a corporation org
ized under the laws of the State of Kentucky, with
chief office and place of business in the State of Kentuc
None of the defendants is a citizen of the State of K
tucky. All of the defendants are citizens and residents
states other than the State of Kentucky.

II

Plaintiff states that on or about the 8th day of Dec
ber, 1947, it entered into a contract with Vandeventer
Augustus, a partnership, in accordance with which

Vandevelde and Augustus, as independent general contractors, agreed to erect on a certain plot of land in the [fol. 118] City of Paducah, Kentucky, bounded by Second Street, Jackson Street, the right-of-way of the Nashville, Chattanooga & St. Louis Railway, and a brick warehouse building used by the plaintiff on Ohio Street, said plot of land being separated from the plant of the plaintiff by the railroad right of way above referred to, a manufacturing building. Said building when completed would have greatly enlarged the manufacturing facilities of plaintiff at Paducah, and would have required the employment of a very much larger number of employees than were employed by it in Paducah in May, 1948. Prior to May 26, 1948, it had constructed a railroad siding contiguous to the proposed new plant to be used in the shipment of its manufactured product from said plant. Prior to May 26, 1948, said general contractors had begun the construction of said building, and in connection with the construction work had accumulated large quantities of material and equipment to be transported into the State of Kentucky, from and through other states. The construction work had progressed to the point of completing the foundation of the building. It states that the first carload of structural steel to be used in the construction of said building was placed on a track at the building site on June 1, 1948, and that another car had arrived within a few days. When an effort was made immediately, or shortly thereafter, by sub-contractors employed by the above named general contractors, to unload said structural steel from the cars on the track above referred to, the defendants, through their members, agents and representatives, caused a picket line to be placed and maintained around said construction work. Said general contractors were not employees of the plaintiff, but were independent contractors. They had no labor dispute with their employees, and none of the contractors under them had any labor dispute with their employees. At all times after the above date, whenever said Vandevelde and Augustus, or their subcontractors, attempted to work on the construction of said building referred to, defendants began picketing said construction job, and thereby caused the employees of said general contractors, and their sub-contractors, to refuse to work on said construction job. By

[fol. 119] their conduct in picketing said work, and the[ir] their agents and representatives and members in ca[rry] said work to be picketed, the defendants induced and [en]aged employees of said general contractors and their [sub] contractors, to engage in concerted refusal in the cours[e of] their employment to perform services for said general [con]tractors and their sub-contractors, the object thereof [was] to force or require the said Charles Vandevelde [Co.] doing business with, or rendering service to or working [for] the plaintiff, and to force the plaintiff to bargain wi[th] defendant, United Brick and Clay Workers of A[merica] which had not been certified as the representative of [the] employees of this plaintiff under the provisions of Sec[tion] 9 of the National Labor Relations Act.

Because of and as the direct and proximate result of [the] action of the defendants, as aforesaid, the employees [of] the general contractors and the sub-contractors were [in]duced and encouraged to and did engage in concerted [re]fusals in the course of their employment to work on [the] construction of said building, and as the direct and pro[xi]mate result of such refusal, plaintiff was compelled [to] continue the construction of said building.

III

It states that in the purchase of materials, in [the] paid to the general contractors, and architects, [for] and materials furnished in the construction of [the] siding, and in demurrage paid on loaded cars [which] not permitted to unload, and which the [gen]eral [con]tractors above referred to were not permitted to unload, [by] the acts of the defendant above referred to, it paid [the] of Eighty-three Thousand, Four Hundred [Eight] and Twenty-six Cents ($83,408.26). It was [obliged] of building material purchased by it as aforesaid [at] aggregate price and value of Thirty-nine Thousand [Four] Hundred Two Dollars and Seventy-four Cents ($39[,402.74]). The balance paid by it as aforesaid, amounting [to] three Thousand, Six Hundred Five Dollars and [Fifty-two] Cents ($43,605.52), was a total loss to the plaintiff. It states that the foundation of the Building, which [it] [fol. 120] to have constructed, is useless for any [purpose] cept the purpose for which it was constructed. [That]

plaintiff cannot now use said foundation, and that it has been damaged by the wrongful act of the defendants, as aforesaid in the above amount, namely Forty three Thousand, Six Hundred Five Dollars and Fifty two Cents ($43,605.52).

IV

It states that at all times herein mentioned it was engaged in the business of manufacturing and selling lamp bases. If said Vandevelde and Augustus, the general contractors above referred to, had been permitted to complete the work called for under the contract of December 8, 1947, the said new factory building would have been ready and complete and ready for use and occupancy on or about the 1st day of September, 1948. The wrongful acts of the defendants above referred to continued through the month of June and the greater part of the month of July, 1948, the work on said contract being picketed repeatedly whenever any steps were taken to resume, and the plaintiff was thereby compelled and did cancel and terminate said construction contract. The processing of its manufactured product requires additional freight in shipping partially manufactured lamp bases from Paducah to Chicago, costs of packing such lamp bases in Paducah, and costs of unpacking same in Chicago, all of which costs are made necessary by reason of the wrongful acts of the defendants in preventing the completion of the construction of said additional manufacturing facilities at Paducah. By reason of said wrongful acts, it has lost the use of the new building and more economically arranged and planned manufacturing facilities at Paducah, and has been and will continue to be required to have completed elsewhere the processing of its wares begun in its plant at Paducah at an additional expense, on account of freight and packing and unpacking labor. Said additional expense has been incurred to since September 1, 1948, the date on which the new building would have been completed had such completion not been prevented by the wrongful acts of the defendants herein complained of. It states that by reason of the [fol. 121] wrongful acts of the defendants it has lost the use of well planned and well located facilities for the manufacture of complete lamps in buildings so located as to reduce the costs of manufacture and eliminate costs of pack-

ing, transportation and unpacking. This cost of packing, transportation and unpacking now required in order that plaintiff's product may be manufactured into a complete unit, diminishes the value of the use of plaintiff's existing manufacturing facilities, and because of such increased costs plaintiff's plant is and will be less efficient and valuable, all of which is the direct and proximate result of the wrongful acts of the defendants in preventing the completion of plaintiff's new plant at Paducah, as aforesaid. It states that the loss of use of the new building and facilities it planned to construct at Paducah in accordance with said contract of December 8, 1947, and the resulting additional manufacturing expense are the direct and proximate result of the wrongful act of the defendants, as aforesaid, and it states that it has been damaged by reason of said wrongful act of the defendants, and on account of the loss of use of said additional expanded facilities in the additional sum of Two Hundred Thousand Dollars ($200,000.00).

Wherefore, plaintiff prays for judgment against the defendant, The United Brick and Clay Workers of America, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the American Federation of Labor, in the sum of Two Hundred Forty-three Thousand, Six Hundred Five Dollars and Fifty-two Cents ($243,605.52).

James G. Wheeler, of Wheeler & Marshall, Paducah, Kentucky, Attorneys for Plaintiff.

Copy received this 5th day of December, 1950.

Joseph S. Freeland, Attorney for Defendants

[fol. 122] RESPONDENT'S EXHIBIT A-4

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY AT PADUCAH.

Civil Action No. 477

DEENA ARTWARE, INCORPORATED, Plaintiff,

v.

THE UNITED BRICK & CLAY WORKERS OF AMERICA, ET AL., Defendants

JUDGMENT

The jury empaneled herein having returned a verdict for the plaintiff, Deena Artware, Incorporated, against the defendants United Brick and Clay Workers of America and American Federation of Labor in the amount of $29,985.85, it is now the judgment of the Court upon said verdict that the plaintiff recover of said defendants the said sum of $29,985.85, together with interest thereon at the rate of six percent (6%) per annum from the date of this judgment until paid, and plaintiff's costs herein expended as against said defendants, for all of which execution is awarded.

Said jury having also, under the direction of the Court, returned a verdict herein for the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, it is now adjudged that the complaint of the plaintiff, Deena Artware, Incorporated, be and it is hereby dismissed absolutely as against said last-named defendant, and that said defendant recover of the plaintiff its costs, for which costs execution is awarded.

/s/ Roy M. Shelbourne, U. S. District Judge.

December 15, 1950.

Copy received 12/15/50

/s/ James G. Wheeler, Joseph S. Freeland.

[fol. 123] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 790

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

DEENA ARTWARE, INCORPORATED, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 5, 1959

Upon Consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including March 28, 1959.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March, 1959.

[fol. 124] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 790

ORDER ALLOWING CERTIORARI—May 4, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart took no part in the consideration or decision of this application.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959

LE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1959
JAMES R. BROWNING, Clerk

No. [redacted] 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INCORPORATED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
RALPH S. SPRITZER,
Assistant to the Solicitor General,
Department of Justice,
Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
THOMAS J. MC DERMOTT,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
IRVING M. HERMAN,
ROBERT A. WOODS,
Attorneys,
National Labor Relations Board,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	5
Reasons for granting the writ	13
Conclusion	21
Appendix A	22
Appendix B	36

CITATIONS

Cases:

Hutchins v. *Munn*, 28 App. D. C. 271	17
Pettibone v. *United States*, 148 U. S. 197	17
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177	18
Regal Knitwear Co. v. *National Labor Relations Board*, 324 U. S. 9	19, 20
Southport Petroleum Co. v. *National Labor Relations Board*, 315 U. S. 100	19, 20
Wallace Corp. v. *National Labor Relations Board*, 159 F. 2d 952	16
Walling v. *Reuter Co.*, 321 U. S. 671	19

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):	
Section 10(c)	3
Section 10(e)	4
18 U. S. C. 401(3)	12

Miscellaneous:

Anno., 120 A. L. R. 703	17
2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed., 1871)	17

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INCORPORATED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered December 13, 1958, dismissing the civil contempt petition filed by the Board against Deena Artware, Incorporated, and others, and denying the motion by the Board for discovery, inspection and depositions upon oral examination.

OPINIONS BELOW

The opinion of the court below in the instant contempt proceeding (Appendix A, *infra*, p. 22), dated

December 13, 1958, is not yet reported. Earlier relevant opinions of the Court of Appeals are as follows: (1) opinion of July 30, 1952, upholding and directing enforcement of the Board's back-pay order, 198 F. 2d 645, certiorari denied, 345 U. S. 906; (2) opinion of November 10, 1953, denying Board's application for an order of discovery and for an injunction restraining Deena Artware from transferring certain funds to its parent corporation, Deena Products Inc., 207 F. 2d 798; (3) opinion of December 16, 1955, upholding and directing enforcement of the Board's supplemental back-pay order, 228 F. 2d 871; (4) opinion of January 17, 1958, denying Board's application for an order of discovery, 251 F. 2d 183. These four opinions are set forth in chronological order in Appendix B, *infra*, pp. 36-70.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 22, 35) was entered on December 13, 1958. By order of Mr. Justice Stewart, dated March 5, 1959, the time within which to petition for a writ of certiorari was extended to March 28, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In a petition to adjudge respondents in civil contempt for refusing to pay certain amounts of back pay due to various employees as a result of their discriminatory discharge by respondent Deena Artware, the Board alleged that (1) between the date of entry of the Court of Appeals' decree enforcing the Board's original back-pay order and the court's entry of a supplemental decree approving the Board's determination of the specific amounts of back pay due, respondents

had siphoned off the assets of Deena Artware for the purpose of avoiding payment of any back pay found to be due and owing, and (2) that respondents are integral parts of a single enterprise and, as such, were and are answerable to the court's decrees, which explicitly run against Deena Artware and its officers, agents, successors and assigns.

The questions presented are:

1. Whether the court below properly held that acts calculated to frustrate a decree for back pay cannot serve as a basis for civil contempt proceedings when it appears that such acts were performed in the interval between entry of the original unliquidated back-pay decree and entry of the supplemental decree fixing the specific amounts of back pay due.

2. Whether, in any event, the court below erred in dismissing the petition without determining whether respondents, or any of them, are answerable to the supplementary decree as "officers, agents, successors, and assigns" of Deena Artware.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151 *et seq.*), are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and

shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practices, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari

or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

STATEMENT

(*Events prior to the contempt proceedings.* On October 25, 1949, the Board issued its Decision and Order against Deena Artware. 86 NLRB 732, 95 NLRB 9. The Board found that Deena Artware had violated the National Labor Relations Act by discharging and refusing to reinstate 66 of its employees who had engaged in a strike. The Board directed "Deena Artware, Incorporated, Paducah, Kentucky, and its officers, agents, successors, and assigns" to offer reinstatement to the discharged employees and to make them whole for any loss of pay suffered by them as a result of the discrimination against them. To this end, the employer was directed to pay each of them a sum equal to the amount which he normally would have earned as wages during the period of displacement, less net earnings received during such period from other employment.

On July 30, 1952, the court below affirmed the Board's decision with respect to 62 of the 66 employees involved and entered a decree enforcing the Board's order (Appendix B, *infra*, pp. 36-50; R.1.). This Court denied Deena Artware's petition for a writ of certiorari, 345 U. S. 906.

On or about March 4, 1953, Deena Artware offered reinstatement to all of the strikers. Shortly thereafter, however, Deena Artware closed its various departments. It has never resumed operations and has paid no back pay to any of the employees in question.

On April 9, 1953, the Board applied to the court below for an order restraining Deena Artware from

making a partial assignment to Deena Products, Inc. (herein called Products), its parent corporation, of the proceeds of a judgment recovered by the former. At the same time, the Board filed application for an order permitting discovery, alleging in support that the affairs of the two corporations were being conducted in such a way as to dissipate the assets of Deena Artware for the purpose of avoiding its back-pay obligations (then unliquidated). The court below denied these motions on November 10, 1953, holding that, until the amount of back pay was liquidated and payment of the fixed sum refused, there was no warrant for action on its part (Appendix B, *infra*, pp. 51-57). The court added (*infra*, p. 56) that if, upon liquidation, "any financial inability on the part of [Deena Artware] to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken."

Thereafter, the Board held hearings, and on April 21, 1955 issued its Supplemental Decision and Order determining the specific amounts of back pay due to the individual employees involved. The order directed Deena Artware, its officers, agents, successors, and assigns to pay those amounts, which totaled approximately $300,000.00. 112 NLRB 371.

On December 16, 1955, the court below affirmed the Board's supplemental decision and entered its own supplemental decree, which was similarly directed against Deena Artware, its officers, agents, successors and assigns (Appendix B, *infra*, p. 58; R. 233).

In 1957, the Board moved the court below for dis-

R." refers to the typewritten record made in the Court of A[illegible] which has been certified to this Court.

covery, inspection and depositions, naming Deena Artware, its President (Weiner), Products, and Products' other subsidiaries (Deena of Arlington, Inc., Sippi Products Company, Inc., and Industrial Realty Company, Inc.). The Board alleged that Weiner, who controlled Products and its various subsidiaries (including Deena Artware), had caused the assets of Deena Artware to be siphoned off through the other corporations under his (Weiner's) control for the purpose of evading the back-pay obligation. The motion for discovery was made in order to enable the Board to show facts which would warrant a contempt adjudication requiring payment of the back pay by Deena Artware, its affiliated companies and their officers.

On January 17, 1958, the court below, with Judge (now Mr. Justice) Stewart dissenting, denied the Board's motion (Appendix B, *infra*, pp. 60-70). The court held (*infra*, p. 66) that, in the absence of contempt proceedings, a motion for discovery and inspection was premature and that the "proper procedure would seem to be through contempt proceedings, by which the issue would be raised whether the allegations of the pleading legally constitute contempt."

The contempt proceedings. On August 20, 1958, the Board petitioned the court below (R. 4-17) to hold Deena Artware, Weiner, Products and its affiliated corporations, in civil contempt. The Board also renewed its motion (see R. 49-66) for discovery, inspection and the taking of depositions.

The petition alleged that Deena Artware, Weiner, and the affiliated corporations had failed and refused to compensate the aggrieved employees. In support

of the prayer that respondents be adjudged in contempt and that an order be entered directing respondents to purge themselves of contempt by paying the sum of back pay due to the various employees, the petition alleged as follows:

Deena Artware is, or was, one of several wholly owned subsidiaries of Products, an Illinois corporation engaged in the manufacture and sale of lamps. In recent years, the manufacturing processes have been performed by Products' various subsidiaries (including Deena Artware) and Products has confined itself largely to sales and distribution. Products organized Deena Artware in 1946 as a Kentucky corporation to acquire a small pottery plant at Paducah for the manufacture of china urns for lamp bases. Other subsidiaries include Sippi Products Co. (herein called Sippi), organized in 1948 to operate a similar plant at Wickcliffe, Kentucky; Deena of Arlington, Inc. (herein called Arlington), formed to operate a lamp assembly and shade plant at Arlington, Kentucky; and Industrial Realty Co., Inc. (herein called Industrial), a Kentucky Corporation organized about November 1954, after Deena Artware allegedly terminated active operations, to hold title to Deena Artware's plant and other physical assets. At all relevant times, Products has owned virtually all the shares of each of the subsidiaries; and George H. Weiner, who owns virtually all the stock of Products, has been president and treasurer of Products and of each of the subsidiaries and has been a director in each corporation (the other directors having been his wife, son and secretary).

The subsidiaries (except Industrial) manufacture for, and sell to, Products and or the other subsidiaries exclusively at prices fixed by Products. Products and Weiner have provided the subsidiaries with their raw materials and supplies and have maintained management and over-all supervision of the plants and production of the subsidiaries. The parent company has maintained the books and records of the subsidiaries at its Chicago offices, managed and controlled their funds and bank accounts, commingled the funds and property of the subsidiaries with those of Products, and regularly furnished consolidated financial statements to credit agencies and creditors representing that the subsidiaries are integral parts of Products.

On October 31, 1949, six days before the issuance of the Board's Decision and Order in the unfair labor practice proceeding, Products and Weiner caused Deena Artware, in order to guarantee the latter's alleged indebtedness to Products, to execute a promissory note to Products for $75,459.65, payable within five years, with interest at 6 percent payable semiannually. This note was secured by mortgages on Deena Artware's real and personal property. On or about September 19, 1952, Deena Artware executed further mortgages, allegedly to secure another promissory note payable to Products.

On December 16, 1952, following entry of the enforcement decree by the court below, Products and Weiner caused Deena Artware to make a partial assignment to Products of the proceeds of a judgment recovered by Deena Artware (a judgment against the union involved in the unfair labor practice proceedings

before the Board). On or about January 22, 1954, Products received $19,320.97 under this assignment.

In April 1953, Products and Weiner caused Deena Artware to cease all operations. Thereafter, Products received from Sippi the supplies it had customarily received from Deena Artware. Until November 1954, Sippi and Products, without payment, used Deena Artware's plant premises, facilities and properties at Paducah.

On November 24, 1954, upon maturity of the promissory note of October 31, 1949, and apparently in lieu of foreclosure proceedings, Products and Weiner, with knowledge of the proceedings before the Board to determine the exact amounts of back pay due, caused Deena Artware to convey all of its real and personal property to Products in cancellation of its then alleged indebtedness of $105,000, leaving as Deena Artware's sole unsatisfied obligation the back pay due under the decrees herein. Deena Artware has engaged in no business activities since this transfer.

Thereafter, in May 1955, Products and Weiner conveyed the former Deena Artware plant and equipment to a newly organized subsidiary, Industrial Realty Co., Inc., which continues to hold the legal title to the properties. Products and Weiner then caused Industrial to lease the plant and equipment to Sippi, which has occupied and operated it as a branch of its principal plant at Wickcliffe. The former manager for Deena Artware has since managed the Arlington plant and has had general supervision over the two Sippi plants. The same equipment, production, and manufacturing and distribution arrangements exist at the new Sippi

branch plant as existed when the plant was operated by Deena Artware.

The theory of the petition was (1) that, during the period between the entry of the court's decree enforcing the Board's initial back-pay order (July 30, 1952) and the court's supplemental decree enforcing the Board's supplemental order (December 16, 1955), Weiner, Products and the affiliates had caused the affairs and business of Deena Artware to be conducted in a manner which divested Deena Artware of its assets, for the purpose of preventing and frustrating compliance with the decrees of the court below; and (2) that Weiner, Products and the various subsidiaries (including Deena Artware) were integral parts of a single enterprise, and the insolvency of Deena Artware could not relieve the other respondents of their obligations, as officers, agents, successors or assigns, to comply with the back-pay decrees.

Deena Artware moved that the petition be dismissed, asserting that there was no claim which would warrant the requested relief (R. 20). It also filed an answer admitting certain of the allegations, denying the allegations of fraud or wrongdoing on its part, and affirmatively alleging that the transactions complained of were *bona fide* business transactions, and that the notes, mortgages, assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given (R. 20-23). Weiner and the other affiliated corporations moved that the petition be dismissed for want of jurisdiction (R. 44-48). Alternatively, they adopted as their own the allegations of the answer filed by Deena Artware (*ibid.*).

The decision of the court below.—The court below granted the motions of Deena Artware, Weiner and the affiliated corporations to dismiss the contempt petition, and denied the motion of the Board for discovery, inspection and the taking of depositions (Appendix A, *infra*, pp. 22-35). It reasoned that, under 18 U. S. C. § 401(3), the refusal to comply with a back-pay award, when one is financially able to do so, is contempt of court, but that at least since December 16, 1955, the date of the supplemental decree, Deena Artware had been financially unable to pay the awards, so that its failure to pay at any time after this date could not furnish a basis for contempt proceedings.

Insofar as the petition alleged that Deena Artware, Weiner, Products and the affiliates had, between the dates of the two decrees, taken steps in furtherance of a scheme to divest Deena Artware of its assets for the purpose of frustrating and preventing compliance, the "decisive question" for the court was "the effective date for the purpose of contempt proceedings of the order or decree of this Court which it is alleged the respondents have disobeyed." On this point the court below held (Appendix A, *infra*, pp. 32, 35):

> Acts of a respondent *prior* to the entry of the order or judgment which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order, or judgment expected by him to be thereafter entered.
>
> * * * * *
>
> * * * We are of the opinion that the enforcement order of July 30, 1952, which left undecided and undisposed of the amounts of back pay which any

individual employee would be entitled to receive, was not sufficiently definite and mandatory to serve as the basis for contempt proceedings, and that the order which must serve as the basis for such proceedings is the supplemental decree of December 16, 1955.

Since the transactions alleged to have resulted in the dissipation of Deena Artware's assets occurred prior to December 16, 1955, there was, in the opinion of the court below, no basis for treating them as contumacious.

The Court of Appeals did not discuss the allegations by the Board that Weiner and the corporate affiliates, as part of the same enterprise; or as the *alter egos*, successors or agents of Deena Artware, were responsible for payment of the back pay, and therefore in contempt of the supplemental decree.

REASONS FOR GRANTING THE WRIT

Approximately eleven years ago, the 60-odd employees whose rights are here at stake were discriminatorily discharged. Almost ten years ago, the Board entered its original order holding that they were entitled to compensation for the resultant loss of wages. Almost seven years ago the Court of Appeals decreed the enforcement of that order. Now, several proceedings and some years later, it is uncertain that they will ever be paid. Yet, if the Board's allegations are true—and in the present posture of the case it must be assumed that they are—the failure of the law to achieve its purposes in this case has been brought about solely by the tactics of the employer. On the allegations, these tactics were, at the least, calculat-

ingly evasive, and, at the worst, the tactics of chicanery and fraud.

In no sense can this breakdown of enforcement be attributed to a lack of care or zeal on the part of the Board. The Board petitioned the Court of Appeals for enforcement of its order and obtained a decree of enforcement in due course. (See opinion of July 30, 1952, Appendix B, *infra*, pp. 36-50.)

There remained the laborious task of determining, in supplementary proceedings, the exact amounts due each of the 63 employees, after appropriate setoff of amounts which were or might have been earned in other employment.

In 1953 (the supplementary determinations not having yet been made), it appeared to the Board that Deena Artware's assets were being diverted in pursuance of a scheme of evasion. The Board thereupon applied to the Court of Appeals for an order of discovery so that it might ascertain the full facts. At the same time, it sought to enjoin an assignment of assets from Deena Artware to Products. These motions were denied in November 1953 on the ground that action by the court would be premature before Deena Artware's obligations were liquidated. The court gave assurance, however, that if, later, "any financial inability on the part of [Deena Artware] to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken." (Appendix B, *infra*, p. 56.

In 1955, the Board issued its supplemental order determining the exact amounts due the individual employees, and in the same year the Court of Appeals directed enforcement of that order. When it appeared

to the Board that "in the meantime," *i.e.*, between the dates of the court's two decrees, the assets of Deena Artware had been siphoned into affiliated corporations, the Board again applied to the court for leave to pursue discovery procedures. The court held, however, that this application was premature and that discovery should await the formal institution of a contempt proceeding.

The Board, following the line laid down by the court, filed its petition to hold respondents in contempt and renewed its application for discovery. The Court of Appeals has now concluded, however, that there is no basis for a contempt proceeding because the damage (the diversion of assets) was accomplished before the court's supplemental decree was entered. Its opinion announces as a general rule that "Acts of a respondent *prior* to the entry of the order or judgment which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order, or judgment expected by him to be thereafter entered." (Appendix A, *infra*, p. 32.) The opinion fails to consider the Board's contention that respondents, other than Deena Artware, are, in any event, answerable to the supplementary decree since they are "officers, agents, successors, or assigns" of Deena Artware.

The end result is that the Board, which has acted conscientiously at all stages of this case in order to fulfill its statutory duty to the aggrieved employees, finds that, however it proceeds in a situation of this kind, it is bound to be either too early or too late.

In our view, this case represents a serious failure of the law enforcement process. Far more important

than the consequences in relation to the particular employees affected, we believe that the decision reflects fundamentally mistaken views as to the status and effect of Board orders and the provisions for enforcement which Congress has provided. The case thus has serious portent for the future administration of the Act.

1. The Board's original order, which the Court of Appeals ordered enforced, required that the affected employees be made whole for the loss of pay occasioned by Deena Artware's unfair labor practices. In its latest decision, however, the Court of Appeals has held in substance that this order had no teeth.

We agree that mere non-payment could not constitute a violation until the amounts to be paid became liquidated. But it is quite another thing to say that the court's first decree imposed no enforceable duty. In our view, the enforcement decree was not inchoate. Rather, it was "analogous to [an] interlocutory judgments of courts fixing liability" but leaving the details to future determination. *Wallace Corp. v. National Labor Relations Board*, 159 F. 2d 952, 954 (C. A. 4). It imposed a fixed and immediate obligation to stand ready to make payment. At a minimum, this included the duty to refrain from engaging in acts calculated to frustrate the decree during the pendency of the supplementary proceedings. The fact that the amounts to be paid had not become finally fixed cannot be taken to mean that in the meantime the respondents could purposefully and permanently disable themselves from meeting their declared obligation. The Court of Appeals correctly stated in its 1953 opinion (Appendix B, *infra*, p. 56) that such "improper actions" would

constitute a contempt. It erred, we submit, when it subsequently departed from that view.

It is no novel principle of equity jurisprudence that one may not plead inability to comply with a decree when one has caused such inability (as alleged to be the case here) for the very purpose of evading compliance. Indeed, the principle has been applied in situations where no order whatever had been entered, but the party before the court had notice that an order was forthcoming. As Daniell states (2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed., 1871)):

> * * if he is informed that the injunction has been granted, and, there will be no delay on the part of the plaintiff in endeavoring to get the order drawn up, the defendant will be committed for the breach of it; because it would be a contempt to act contrary to such an order, when he knew the order was made. In these and the like cases, all the mischief might be done, and the Court might as well grant no injunction at all, unless this kind of notice was to be held sufficient. In the instance of an injunction against committing waste, the party in the interval might lay the axe to the trees * * *. In short, the Court will not, under such circumstances, permit a man to elude its justice, by doing that, before the injunction is sealed, which, if it was actually sealed, would be a contempt * * *.

And see *Pettibone* v. *United States*, 148 U.S. 197, 206-207; *Hutchins* v. *Munn*, 28 App. D. C. 271; Anno., 120 A. L. R. 703.

What is true of a criminal contempt proceeding in which no order or injunction has yet been entered certainly applies with far greater force to a remedial, civil contempt proceeding predicated upon a decree which unequivocally directs that redress shall be made by paying back wages. Were the rule otherwise, Board orders for back pay, duly enforced by the Courts of Appeals, could be rendered nugatory during the pendency of the supplementary proceedings which are invariably necessary.

As this Court has said, "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. The seriousness of a decision which opens the way to evasion of such orders is emphasized by the frequency with which the Board is called upon to invoke the back pay remedy. Board records show that during the last fiscal year nearly 7,000 charges were filed involving alleged discrimination against employees and consequent loss of pay.

2. Even if, contrary to our views, respondents should be deemed beyond the reach of the court's original decree, we fail to see any basis for concluding that they are not answerable to the supplementary decree (with the exception of Deena Artware, which was already insolvent at the time of its entry).

The Board alleged that Products and its various subsidiaries (including Deena Artware) were controlled by the same individual (Weiner); that Deena Artware was but a division or department of an integrated enterprise; that, in pursuance of a scheme

of evasion, Weiner caused the assets of Deena Artware to be diverted to the other members of the family of corporations which he controls; and that these other corporations are heirs to the assets and business of Deena Artware and are now conducting that business.

As pointed out above (pp. 5, 6), the relevant back-pay orders and decrees were made binding upon the "officers, agents, successors, and assigns" of Deena Artware. This Court has said of a similar Board order that it could not be frustrated by an employer's mere "change in name or in apparent control." *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106. And in a case involving a somewhat analogous order issued under the Fair Labor Standards Act, it ruled (*Walling* v. *Reuter Co.*, 321 U.S. 671, 674):

> * * * Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, * * * but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons. The vitality of the judgment in such a case survives the dissolution of the corporate defendant. * * *

And see *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14.

The opinion in the instant case offers no reason for the failure to determine the liability of respondents as "officers, agents, successors, and assigns." The only comment in the opinion which sheds any light on the matter is the observation that the transactions alleged

by the Board might have been attacked as conveyances "in fraud of creditors in "proceedings instituted under the provisions of Section 378.010 and 378.060, Kentucky Revised Statutes" (Appendix A, *infra*, pp. 32-33). As this Court's *Southport* and *Regal* decisions, *supra*, make clear, however, the Courts of Appeals have both the power and the duty to effectuate full compliance with their decrees directing enforcement of Labor Board orders.

In its earlier opinion of January 17, 1958, denying the Board's application for an order of discovery, the Court of Appeals made the same suggestion that the Board might proceed in a trial court as an ordinary judgment creditor. Judge (now Mr. Justice) Stewart stated in dissent that the majority's view on this point stemmed from "a fundamental difference in our concepts as to the nature of the jurisdiction conferred by Section 10(e) of the National Labor Relations Act" (Appendix B, *infra*, p. 68). The dissent points out (*ibid.*) that a Court of Appeals, in exercising the statutory jurisdiction conferred by Section 10(e), does not serve as an appellate court, but exercises original and exclusive jurisdiction. The dissent concludes correctly, we believe—that (*ibid.*):

> Even if the Board could properly now institute a trial court proceeding, the object of such a proceeding could only be the effectuation of the enforcement decree of this court. The effectuation of that decree is the proper business of this court alone. Whether or not the Board is called a judgment creditor of the respondent, any action taken in a trial court would stem solely from the enforcement decree of this court, whose function it is to

retain jurisdiction to administer all necessary further relief.* * *

The Court of Appeals' failure to retain jurisdiction and to allow proof of the need and justification for further relief was erroneous, we submit, and requires correction by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

JEROME D. FENTON,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

IRVING M. HERMAN,
ROBERT A. WOODS,
Attorneys,
National Labor Relations Board.

MARCH 1959.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INCORPORATED, RESPONDENT

ON PETITION FOR ADJUDICATION IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

Decided December 13, 1958

Before: Martin and Miller, Circuit Judges, and Jones, District Judge.

Miller, Circuit Judge. The National Labor Relations Board has petitioned this Court to adjudge in civil contempt of this Court the respondent, Deena Artware, Incorporated, hereinafter referred to as Artware, its president and agent George H. Weiner, and four other corporations who are affiliated with Artware as hereinafter set out, for resisting, disobeying and violating, and refusing to comply with the decree of this Court entered herein on July 30, 1952, and the supplemental decree entered herein on December 16, 1955.

This is the fifth time this case has been before us. Our previous opinions, to which reference is made, give in detail the factual background and history of the litigation. For our present purposes, we will restate only such basic facts as are necessary to present the issue now under consideration.

On July 30, 1952, this Court entered its decree in this case enforcing an order of the Board issued on October

25, 1949, against respondent Artware, directing *inter alia*, that Artware, its officers, agents, successors and assigns, make whole certain named employees for any losses in pay they may have suffered by reason of respondent's discrimination against them in refusing to reinstate them following the termination of a strike, in violation of the National Labor Relations Act. *N. L. R. B.* v. *Deena Artware, Inc.*, 198 F. (2) 645, C.A. 6th cert. denied, 345 U.S. 906. The case was remanded to the Board for the purpose of hearings and findings as to the amounts due the individual employees.

On November 10, 1953, this Court denied motions of the Board to enjoin Artware and its president Weiner from assigning to Deena Products Co., its parent corporation, in part payment of an alleged indebtedness owing by Artware to Deena Products Co., the unpaid portion of a substantial judgment which Artware had recovered against United Brick & Clay Workers and the American Federation of Labor as damages resulting from an illegal secondary boycott. *N. L. R. B.* v. *Deena Artware, Inc.*, 207 F. (2) 798, C.A. 6th; *United Brick & Clay Workers* v. *Deena Artware, Inc.*, 198 F. (2) 637, C.A. 6th, cert. denied, 344 U.S. 897. The principal ground for this ruling was that the amounts due the employees whose claims the Board was attempting to protect against dissipation of Artware's assets were unliquidated. It was also pointed out in that opinion that since the claims were unliquidated, this Court would not treat the assignment by Artware of its assets as being in contempt of this Court's previous order to make whole the employees it had illegally discharged.

Following the remand of the case to the Board, the Board held hearings and issued its supplemental decision and order directing payments in specific amounts to designated individual employees, which totaled approximately $300,000.00. On December 16, 1955, this

Court entered its supplemental decree enforcing the supplemental decision and order of the Board, the effect of which was to liquidate the amounts which Artware was ordered to pay to its individual employees. *N. L. R. B.* v. *Deena Artware, Inc.*, 228 F. (2) 871, C.A. 6th.

Artware did not make the payments so ordered. It contended then, as it does now, that it was forced by economic conditions and the labor dispute involved in this litigation to discontinue the operation of its plant in Paducah, Kentucky, during the year 1953; that it was financially unable to make the payments; that there were no assets available for that purpose; and that whatever assets were previously available for creditors had through bona fide business transactions been used in the payment, or to secure the payment, of its legal obligations. The Board contended then, as it does now, that Artware and the several affiliated corporations were integral parts of a single enterprise, substantially owned and controlled by Weiner; that the operations of Artware were conducted in a manner which prevented it from having assets, and thereby prevented compliance with the back pay provisions of the decrees; that Artware's assets were siphoned off or transferred to affiliated companies, in consequence of which Artware was left with no assets with which to comply with the decree; that the affiliated corporations were *alter egos* and or successors to Artware within the meaning of the decrees; and that Artware and the affiliated corporations were subject to the back pay provisions of the decree and responsible for the failure to comply therewith, and liable for payment of said back pay. The Board filed a motion that Artware and the several affiliated corporations be directed to produce and permit the Board to inspect, copy and photograph numerous books, records, bank statements and various types of papers and documents which would show the finan-

cial condition of Artware and the respective obligations and credits rendered between Artware and the affiliated corporations. It also asked that certain present or former officers of Artware and the affiliated corporations be directed to give depositions with respect to the financial ability of Artware to comply with the provisions of the supplemental decree and the dealings and relationship of Artware with said affiliated corporations. These motions were not in support of any contempt proceeding. For that reason this Court, with one judge dissenting, ruled on January 17, 1958, that the motions were premature and that such discovery proceedings would not be authorized or ordered in the absence of contempt proceedings, the validity of which, as a matter of law, should be first passed upon by this Court. *N. L. R. B.* v. *Deena Artware, Inc.*, 251 F. (2) 183, C.A. 6th.

On August 20, 1958, the Board filed the present petition for adjudication in civil contempt. It has also refiled its motion, in substantially the same form as previously filed, for discovery and inspection of documents of Artware and the four affiliated corporations and for an order directing that depositions be taken of present or former officers of the five affiliated corporations.

The petition for adjudication in civil contempt names the five affiliated corporations as being Deena Products Company, Inc., hereinafter called Products, an Illinois corporation maintaining plants and its principal office in Chicago, Illinois, which is the parent corporation, and its four subsidiaries, namely, Artware, Deena of Arlington, Inc., hereinafter called Arlington, Sippi Products Company, Inc., hereinafter called Sippi, and Industrial Realty Company, Inc., hereinafter called Industrial. It alleges that at all times material herein, Weiner has owned all the shares of stock of Products except for the minimum shares required by directors to

qualify for office; that Products has owned all the shares of stock of the four subsidiaries except for the minimum shares required by directors to qualify for office; that the officers and directors of Products and of the subsidiaries have been Weiner, his wife, his son, and whoever has been employed as Weiner's personal office secretary; that Weiner has been president and treasurer of Products and each of the subsidiaries and has actively directed and controlled the financial and business operations of Products and the subsidiaries; that Products and the subsidiaries have constituted and have been operated as a single enterprise, engaged in the manufacture, sale and distribution of lamps, with each of said corporations performing a particular function, as a department or division of one enterprise in the manufacture, sale and distribution of the common product; and that Products and Weiner, through and together with Arlington, Sippi and Industrial, have caused the affairs and business of Artware to be conducted in a manner which divested Artware of its assets during the litigation herein for the purposes of preventing and frustrating compliance with the Court's decrees.

Allegations of detailed facts are made in support of these general contentions. Of major importance are the following. Special attention is directed to the specific dates. (1) About March, 1949, following the hearings before the Board, Products and Weiner in the exercise of their control over the price which Products paid Artware for the urns which Artware manufactured and sold exclusively to Products, reduced such price despite added operations and increased costs, and required Artware to continue to sell and deliver its entire output to products and or Arlington at prices which did not constitute adequate or proper consideration or value for such products or permit Artware to

show a fair return. In consequence thereof Artware showed losses from its operations, although Products made substantial profits on the sale of the completed product. (2) About October 31, 1949, a few days after the issuance of the Board's decision and order of October 25, 1949, Products and Weiner caused Artware to execute mortgages on all of its real and personal property, allegedly to secure the payment of a promissory note, executed at the same time, undertaking to pay Products $75,459.65 within five years from the date thereof, with 6 per cent interest payable semi-annually; that about September 19, 1952, Products and Weiner caused Artware to execute further mortgages on said real and personal property, allegedly to secure payment of a three-year promissory note for $5,797.74 with interest at 6 per cent payable semi-annually; that about December 16, 1952, Products and Weiner caused Artware to make to Products a partial assignment of the proceeds of a judgment in the amount of $29,985.85 which Artware had recovered against the United Brick & Clay Workers of America and the American Federation of Labor, allegedly as security in addition to the mortgages referred to above, and that by reason of said assignment Products received on or about January 22, 1954, the sum of $19,320.97. (3) That about April 24, 1953, Products and Weiner caused Artware to cease all operations and thereafter until about November 24, 1954, Sippi and Products, without payment, used Artware's plant, facilities and properties at Paducah. (4) About November 24, 1954, Products and Weiner caused Artware to convey to Products title to all its property, including its real estate, factory, equipment, machinery, inventory, money and other assets, allegedly in payment of Artware's purported indebtedness in the total amount of $105,000.00 secured by mortgages hereinabove referred to, leaving as Artware's sole unsatis-

fied obligation the back pay due under the decrees herein, and that Artware has engaged in no business activities since the transfer of its property; that about May 4, 1955, Products and Weiner conveyed the plant with its equipment, machinery and other contents, formerly owned and operated by Artware, and its other real estate, to a newly organized corporation, namely, the subsidiary, Industrial, which subsidiary continues to hold the legal title to such properties. The petition also alleges that Artware's alleged indebtedness to Products, to secure which the mortgages and assignments were executed, was not a true and valid indebtedness, nor was it due or owing by Artware to Products, nor were the notes, mortgages and assignments executed for adequate consideration, but were in fact executed for the purpose of evading payment of the sums due under the decrees herein, and that as a result of the conduct above described, Weiner, Products, Arlington, Sippi and Industrial so manipulated the business of Artware as to prevent Artware from accumulating any cash or other assets with which to comply with the decrees herein, the objects thereof being to thwart and frustrate compliance with said decrees. The petition contends that by reason of the foregoing acts, Weiner and the five affiliated corporations and each of them are in civil contempt of this Court, prays that they be so adjudged in civil contempt and that they be ordered to purge themselves of such contempt by forthwith paying in full to each of the employees named in the supplemental decree the sum of money therein specified, and that upon failure to do so the Court issue attachments against each of them.

Artware has moved that the petition be dismissed on the ground that no claims on which the requested relief can be granted are stated therein. It has also

filed an answer admitting some of the allegations as to corporate existence, stock ownership and officer personnel of the affiliated corporations, the execution of mortgages and the transfer of property by it to Products in satisfaction of its indebtedness to Products, that Artware ceased operations on or about April 24, 1953, and that no payments have been made on the back pay awards. It denied the allegations of fraud or wrongdoing on its part and that the business of Artware was conducted in a manner which was calculated or did divest Artware of its assets during this litigation for the purpose of preventing or frustrating compliance with the Court's decrees. It affirmatively alleged that the transactions complained of were bona fide business transactions, and that the notes, mortgages, assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given. Weiner and the other affiliated corporations moved that the petition be dismissed for want of jurisdiction, and in the event such motion should be overruled, adopted as their own the allegations of the answer of Artware.

We accordingly have a large field of factual controversy, including many transactions over a number of years. Hearings on these factual issues could easily take a number of months. The practical problems of who should conduct these hearings and how the expense thereof was to be met, in view of Artware's lack of assets, were discussed in oral argument. The Board has made a number of suggestions. We have concluded that if a hearing becomes necessary, it should not be farmed out to an administrative agency, but should be conducted by the Court through a Commissioner of its own appointment. *Wallace Corp.* v.

N. L. R. B., 159 F. (2) 952, 954, C. A. 4th. But before embarking on that provision for the payment of costs, we must consider the allegations of the petition in order to determine whether, as a matter of law, they are sufficient to serve as a basis for contempt proceedings. This is in accordance with the view heretofore expressed by us in *N. L. R. B.* v. *Deena Artware, Inc.*, supra, 251 F. (2) 183, 185-186, C. A. 6th.

It is, of course, settled law that the power to punish for contempt is an inherent power of the Federal Courts and that it includes the power to punish violations of their own orders. *Green* v. *United States*, 356 U.S. 165, 170; *In Re Manufacturers Trading Corp.*, 194 F. (2) 948, 956, C. A. 6th. It is also settled law that this inherent power can be limited by Congress and has so been limited by Sec. 401, Title 18, U.S. Code. *United States* v. *Hall*, 198 F. (2) 726, Note page 728, C. A. 2nd; *Farese* v. *United States*, 209 F. (2) 312, 315, C. A. 1st; *Cammer* v. *United States*, 223 F. (2) 322, 324, C. A. D. C., reversed on other grounds, 350 U.S. 399. Sec. 401 provides: "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

In the present case the applicable provision is Subsection 3 of Sec. 401. Under that section the deliberate refusal to comply with a back pay award, when financially able to do so, is contempt of court. *N. L. R. B.*

v. *Lawley*, 182 F. (2) 798, C. A. 5th; *N. L. R. B.* v. *Eightner Pub. Corp.*, 128 F. (2) 237, 241, C. A. 7th. See: *Fleming* v. *Warshawsky & Co.*, 123 F. (2) 622, 626, C. A. 7th. Fraudulent devices on the part of a respondent, entered into for the purpose of evading the impact of a back pay award, will be disregarded by the court in contempt proceedings for refusal to comply with the court's order. *Parker* v. *United States*, 135 F. (2) 54, 58, C. A. 1st; *N. L. R. B.* v. *Deena Artware, Inc.*, supra, 207 F. (2) 798, 802, C. A. 6th; *N. L. R. B.* v. *Parsons' Pauch Corp.*, 249 F. (2) 956, C. A. 6th.

On the other hand, it also appears to be settled law that inability to comply with an order requiring the payment of money resulting from insolvency or other cause not attributable to the fault of the party charged will under ordinary circumstances be a valid defense to contempt proceedings. *In Re Sobel*, 242 F. 487, C.A. 2nd; *Healey* v. *United States*, 186 F. (2) 164, 171, C.A. 9th; *United States* v. *Jaeger*, 117 F. (2) 483, 488, C. A. 6th. It appears to be undisputed in the present case, as shown by the allegations of the Board's petition in this contempt proceeding, that at least since December 16, 1955, the date of the supplemental decree which liquidated the amounts to be paid to designated employees, Artware has been financially unable to pay the awards, had no assets of any kind, and was in fact out of business. Disregarding for the moment what transpired before that date, it would seem that Artware's failure to reinstate certain employees and to pay the awards for back pay at any time subsequent to December 16, 1955, would not furnish a basis for contempt proceedings. *N. L. R. B.* v. *Caroline Mills, Inc.*, 167 F. (2) 212, 214, C.A. 5th. We think that the

answer to our present problem is restricted to a consideration of what happened prior to that date.

Sec. 401 (3), Title 18, U. S. Code, plainly limits the power of this court to a case of disobedience or resistance to its "order, rule, decree, or command." This necessarily means an existing order, rule, decree, or command. Acts of a respondent *prior* to the entry of the order or judgement which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order or judgment expected by him to be thereafter entered. *Berry* v. *Midtown Service Corp.*, 101 F. (2) 107, C. A. 2nd, cert. dismissed, 308 U. S. 629; *Ex Parte Baskirk*, 72 F. 14, 20, C. A. 4th; *In re Sixth & Wisconsin Tower*, 108 F. (2) 538, C. A. 7th; *Parker* v. *United States*, 126 F. (2) 370, 380, C. A. 1st. We recognize the argument of the Board that the acts of a respondent prior to the entry of the order or decree should be considered by the Court in determining the questions of intent and wilfulness with respect to his later actions in violation of the decree. Such conduct, although bearing on the question of intent, does not by itself constitute contempt, and if the respondent after the entry of the court's decree or command does not act in "disobedience or resistance" thereto, the argument becomes inapplicable.

In considering this question we must keep in mind the difference between contempt proceedings and certain civil proceedings by which creditors can attack and upset conveyances and transfers by a debtor, which are made with the intent to delay, hinder or defraud creditors or which constitute a preference by a debtor of one creditor over another. The transactions complained of in the present case could have been attacked

and possibly upset by proceedings instituted under the provisions of Sections 378.010 and 378.060, Kentucky Revised Statutes. *Nathanson* v. *N. L. R. B.*, 344 U. S. 25; *N. L. R. B.* v. *Deena Artware, Inc.*, supra, 207 F. (2) 798, 801, C. A. 6th. But whether the transfers and conveyances complained of in the present case constituted preferences or conveyances for the purpose of defrauding creditors is not the question presented to us. On the contrary, we have the narrow issue of whether the transactions and conveyances of Artware and its affiliates were in disobedience or resistance of an existing court order.

This brings us to what is probably the decisive question in this case, namely, the effective date for the purpose of contempt proceedings of the order or decree of this Court which it is alleged the respondents have disobeyed. The original enforcement decree was entered by this Court on July 30, 1952. That decree directed that Artware make whole certain employees for any losses in pay they may have suffered by reason of their illegal discharge. That decree did not direct Artware to pay any amount to any designated employee. At that time it was not known and had not been determined either by the Board or the Court what amount, if any, any particular employee would be entitled to. Failure or refusal to make payment promptly thereafter did not constitute contempt. It is settled law that contempt will not lie for violation of an order of the court unless the order is clear and decisive and contains no doubt about what it requires to be done. *N. L. R. B.* v. *Express Publishing Co.*, 312 U. S. 426, 435; *Traub* v. *United States*, 232 F. (2) 43, 47, and cases cited in Note 7, C. A. D. C.; *McFarland* v. *United States*, 295 F. 648, 650, C. A. 7th. *N. L. R. B.* v. *Bell Oil & Gas Co.*, 98 F.

(2) 405, 406, C.A. 5th. Although Artware knew that it would be later ordered by the Court to make certain specific payments, it was under no order of the Court to do so until such later time. *Berry* v. *Midtown Service Corp.*, supra, 104 F. (2) 107, C.A. 2nd, cert. dismissed, 309 U.S. 629; *Ex parte Baskirk*, supra, 72 F. 14, 20, C.A. 4th.

It was not until December 16, 1955, when the supplemental decree was entered, that the back pay awards became liquidated, with specific amounts allocated to specific employees. There are numerous factors involved in determining what amount, if any, each employee is entitled to. The conduct of the employee during the strike may have been such as to bar his right to any recovery at all. *N. L. R. B.* v. *Mylan-Sparta Co., Inc.*, 166 F. (2) 485, C.A. 6th; *N. L. R. B.* v. *Deena Artwares, Inc.*, supra, 198 F. (2) 645, 652, C.A. 6th; *N. L. R. B.* v. *Ohio Calcium Co.*, 133 F. (2) 721, C.A. 6th. Failure or refusal on the part of certain discharged employees to accept other suitable employment available to them can operate as a bar to any award. *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U.S. 177, 197-200; *N. L. R. B.* v. *Southern Silk Mills*, 242 F. (2) 697, C.A. 6th; *N. L. R. B.* v. *Bishop*, 228 F. (2) 68, 72, C.A. 6th. Elimination of the position formerly held by a discharged employee because of lack of business can likewise defeat a claim for lost wages. *N. L. R. B.* v. *Lightner Pub. Corp.*, supra, 128 F. (2) 237, 241, C.A. 7th; *N. L. R. B.* v. *Reave-DuPont Mfg., Inc.*, 199 F. (2) 631, 634, C.A. 2nd; *Corning Glass Works* v. *N. L. R. B.*, 118 F. (2) 625, 629-630, C.A. 2nd. See: *N. L. R. B.* v. *American Creosoting Co.*, 139 F. (2) 193, 196, C.A. 6th. Sickness of the discharged employee or inability or unwillingness to work are also factors which have to be considered. See: *N. L. R. B.* v. *Moss Planing Mill Co.*, 224 F. (2) 702, C.A. 4th.

The fixing of the amount of the award for back pay is a function of the Board, not the Court, and at times involves difficult problems, in the solution of which the employer is entitled to be heard. *N. L. R. B. v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 346. No award which it makes is enforceable until reviewed and approved by the Court. *Sec. 160, (e) and (f), Title 29, U. S. Code.* It is not contempt of court to refuse to obey the Board's order before it has been judicially confirmed. *N. L. R. B. v. Express Publishing Co.*, supra, 312 U.S. 426, 433. We are of the opinion that the enforcement order of July 30, 1952, which left undecided and undisposed of the amounts of back pay which any individual employee would be entitled to receive, was not sufficiently definite and mandatory to serve as the basis for contempt proceedings, and that the order which must serve as the basis for such proceedings is the supplemental decree of December 16, 1955. Rulings to the same effect are contained in *N. L. R. B. v. New York Merchandise Co.*, 134 F. (2) 949, 952, C.A. 2nd; *Wallace Corp. v. N. L. R. B.*, supra, 159 F. (2) 952, 954, C. A. 4th; and *N. L. R. B. v. Bell Oil & Gas Co.*, 99 F. (2) 56, C. A. 5th. This is also the view heretofore expressed by this Court in *N. L. R. B. v. Dena Artware, Inc.*, supra, 207 F. (2) 798, 802, C. A. 6th. As shown by the allegations of the Board's petition, the transactions relied upon as the basis for contempt proceedings occurred prior to December 16, 1955.

The Board's motion for discovery and inspection and depositions upon oral examination is denied.

The motions of the respondents to dismiss the Board's petition for adjudication in civil contempt are sustained.

APPENDIX B

(1)

No. 11156

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INC., RESPONDENT

Decided July 30, 1952

ON PETITION FOR ENFORCEMENT OF AN ORDER OF NATIONAL LABOR RELATIONS BOARD

Before SIMONS, MARTIN and MILLER, Circuit Judges.

Miller, Circuit Judge. The National Labor Relations Board has petitioned for the enforcement of its order of October 25, 1949 against the Respondent, Deena Artware, Inc., pursuant to § 10(e) of the National Labor Relations Act as amended, 29 U. S. Code, § 160(e). Respondent is a Kentucky corporation engaged in the manufacture and distribution of pottery lamp bases at Paducah, Kentucky, and is engaged in interstate commerce.

The following facts, as found by the Board, are supported by substantial evidence on the record considered as a whole, and are accordingly accepted on this appeal.

Following organization activities on behalf of the United Brick and Clay Workers of America, a Union affiliated with the American Federation of Labor, an election was held on March 17, 1948, at which a majority

of the employees in the appropriate unit voted for the Union, which was thereafter certified by the Board as the exclusive bargaining agent of the employees.

On March 16, 1948, the day preceding the election, George H. Weiner, Respondent's President, addressed the assembled employees, referred to the privileges enjoyed by the employees in the past, and warned them that if the election was won by the Union they would lose their "privileges and freedoms." A few days after the election, Weiner addressed the employees in the Casting Department, stating that he was going to show them what he could do for having stabbed him in the back. He also addressed the employees of the Mold Department, discussed the privileges the employees had previously had, stated that they had chosen their "side" and had stabbed him in the back, and that thereafter "everything would be carried out in a business proposition." In April, following one or two meetings between the Respondent and the Union's Negotiating Committee, Weiner, in an angry mood, told members of the Committee in his office that they had chosen their side and "if you people are out of work and starving, it won't be my fault." During the latter part of March, the Respondent reduced working hours from 48 hours to 40 hours per week, which eliminated overtime earnings. It posted signs prohibiting smoking outside the rest room, which had been previously permitted. It abolished the practice of permitting employees who had completed their day's work to walk outside the plant and revoked the existing privilege of interchanging work shifts by the kiln employees. On July 22, 1948, a Paducah newspaper published remarks made by Weiner to its reporter to the effect that, because of the Respondent's dissatisfaction with the Paducah labor situation, work on an addition to the plant at Paducah would cease and that the unit would be constructed at

Arlington, Kentucky; that the original plans to move Respondent's entire operation over a period of time into Paducah were being abandoned, but that he would keep operating what he had in Paducah unless hazards and difficulties were thrown in his way.

Following the election the Union requested Respondent to negotiate a collective bargaining contract. The Union was represented by Earl Bellew, an international representative of the Union, by Edmund Grimes, "general organizer" of the A. F. of L. who had headed the organizational campaign, and by ten employee members, one from each department of the plant. The Respondent designated as its negotiating committee plant manager Meriwether, Mrs. Hendren, who was in charge of the office at the plant and acted as personnel manager, and Mrs. Hensen, its office clerk. Meetings were held at the Company's office on April 8, 9, 16, 21, 29, 30 and May 6 and 7.

At the first meeting on April 8th, the Union submitted a proposed contract and requested counter-proposals. At the second meeting on April 9th, Meriwether stated that the Respondent declined to bargain with Grimes because he was not a member or officer of the Union, and directed him to leave the premises. Bellew and the Union's negotiating committee left with Grimes. The succeeding meetings were held without Grimes being present. At the meeting on April 16th, the parties discussed the union proposals and a new wage proposal calling for a 25¢ general wage increase. At the succeeding meetings the parties discussed the questions of wages, union seniority, overtime, sick leave, holiday and vacation proposals. Although they were able to agree upon certain minor matters, no agreement was reached on the major issues. The Union made concessions in accepting the Respondent's proposal for the payment of time and a half, rather than double time,

for work on holidays and in agreeing that seniority be applied by departments instead of on a plant-wide basis. The Union's vacation proposal was substantially in accord with the existing practice. The Respondent's counter-proposal reduced the existing vacation privileges and was rejected by the Union. At the meeting on April 30th, the Respondent orally presented a counter-proposal on wages which Meriwether read from a document. Although it was of a detailed character and difficult to analyze without study, he did not make a copy of it available to the Union. There was considerable difference of opinion about its effect, the Union contending that in reality it did not provide any wage increase. It was rejected by the Union. At the meeting of April 30th, Bellew suggested that the parties seek the aid of the Conciliation Service. Meriwether proposed another meeting without the Conciliation Service. At the meetings on May 6th and 7th, the negotiators discussed all of the issues outstanding, but did not reach an agreement. It was then agreed that the next meeting would be arranged by the Conciliation Service. Following the meeting on May 7th, the Union held a meeting in the late evening, at which most of the members of the negotiating committee were present in addition to a few Union employees not on the committee. It was the view of those present that "We have gone as far as we can get in negotiations," and the participants voted to call a strike. It was moved, seconded and carried unanimously "that we go on strike at the plant of Deena Artware, Inc., 632 S. Third Street, due to the breaking off of negotiations by the Company, and that we give Earl Bellew, International Representative, full power and authority to name the day and hour of the strike." There was no specific date set for the strike, as it was decided to give the Conciliation Service a chance to help if it was possible to do so. This action

did not comply with the procedure prescribed by the Union's constitution for approving a strike of a local.

Thereafter, a Conciliation Commissioner notified the Union and the Respondent that a meeting would be held on May 14th at the office of the Respondent's attorney in Paducah. At Respondent's request, the meeting was postponed to May 26th. On May 24th, the Conciliator telephoned to Meriwether that he could not keep the appointment for May 26th and that he wished to change it to May 28th. Meriwether agreed, but asked if the Conciliator had notified Bellew of the change. The Conciliator stated that he had not been able to get in touch with Bellew but that he had left a notice for him at the hotel in Paducah where Bellew usually stayed. Bellew lived in Olive Hill, Kentucky, which was some distance from Paducah. Bellew did not receive the message until May 27th, and, accordingly, he, together with several members of the Union's committee, went to the attorney's office at the appointed hour on May 26th, where they were told by an office clerk that the meeting had been postponed until May 28th. Bellew reported the development to the other committee members, and the committee thereupon decided to call a strike at the plant for 2 o'clock that afternoon. Bellew delegated Bill Girten to inform the management of the plant of the strike. Girten told Meriwether and Mrs. Hendren about the Union's plans. Meriwether asked him the reason for the strike and he stated that the Union was not notified of the change of date of the meeting and that Bellew had driven from Olive Hill only to find that the meeting had been postponed. Mrs. Hendren told Girten that the Company was not responsible for the postponement, that the Conciliator had requested it and had advised Meriwether that he had undertaken to notify Bellew at the Ritz Hotel. Girten stated that "the Union was getting the run

around, and didn't like it and wanted to find out who was to blame." Although Mrs. Hendren explained that the postponement of the meeting was something that the Company had nothing to do with and that the employees should not leave their jobs because of an occurrence over which the Company had no control, Girten stated "We are leaving at 2 o'clock."

Fifty-seven employees left the plant at 2 o'clock. Within the next day or two, they were joined by nine other employees. These 66 employees constituted substantially the entire membership of the Local. Picketing activities commenced shortly after the walkout.

The next morning, the Conciliator advised Bellew that he had arranged a meeting for the next day at the Cobb Hotel at Paducah. On the evening of the same day, an attorney for the Union telephoned the attorney for the Respondent and suggested a conference to discuss the possibility of reopening negotiations. The two attorneys met the next morning at which time the Union's attorney proposed that negotiations be reopened between the Union and the Respondent, and that he would then recommend that the employees return to work. The Respondent's attorney replied that he was not authorized to meet with any representative of the Union and that the Respondent took the legal position that they had no employees on strike to negotiate with. When Bellew met with the Conciliator on the 28th at the Cobb Hotel for the meeting arranged by the Conciliator, he was informed by him that the Company had called off the meeting. The Union held a meeting on May 29th attended by practically the whole membership. Bellew reported that the Conciliator had contacted him and that it looked like there might be a chance to resume negotiations. He recommended that they return to work. The membership thereupon passed a resolution that they return to work. Bellew

and the committee went to the plant and informed Meriwether that the Union members were ready to return to work. Meriwether conferred by telephone with Respondent's attorney and then informed the committee that it was his understanding that the people who went out on strike May 26th were discharged. Meriwether's testimony was that he stated "that we considered them no longer working for us." The next day a Paducah newspaper quoted Mrs. Hendren as saying that the employees could not be reinstated because they were no longer employees of Deena Artware.

On June 1st, 61 of the striking employees sent a letter to Meriwether offering to return to work. Respondent's attorney replied by letter of June 9th stating that the Respondent did not consider the signers of the letter or any of them employees of the Company. On August 23rd, the Respondent rejected the application of an additional employee for the same reason.

The Board ruled that Respondent's conduct during the negotiations with the Union constituted a refusal to deal with the Union in good faith and violated § 8(a) (1) and (5) of the Act, § 158 (a) (1) and (5) Title 29 U. S. Code; Respondent discharged and refused to reinstate 66 of its employees because they had engaged in a strike thereby violating § 8(a) (1) and (3) of the Act, § 158(a) (1) and (3), Title 29 U. S. Code; and that none of the 66 employees who were refused reinstatement, engaged in such conduct as to deprive them of reinstatement under the Act. The Board's order directed the Respondent to cease and desist from (a) discouraging membership in United Brick and Clay Workers of America, A. F. L., or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees; (b) refusing to bargain collectively with United Brick and Clay Work-

ers of America, A. F. L., as the exclusive bargaining representative of all production and maintenance employees; (c) in any other manner interfering with or coercing its employees in the exercise of the right to self-organization; and to take the following affirmative action: (a) offer to the 66 striking employees immediate and full reinstatement; (b) make whole such employees for any loss of pay they suffered by reason of Respondent's discrimination against them; (c) upon request bargain collectively with United Brick and Clay Workers of America, A. F. L., and (d) post appropriate notices at its plant at Paducah.

We are of the opinion that the Board properly ruled from the foregoing facts that the Respondent had interfered with the employees' right to join a Union and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and thereby violated § 8(a) (1) of the Act. The threats of Respondent's President to withdraw the employees' privileges and freedoms, his references to stabs in the back, the revocation of various privileges after the election, his warning that it would not be his fault if the employees were out of work or starving, and the statement in the newspaper about discontinuing expansion of the plant at Paducah and possible abandonment of the plant entirely if hazards and difficulties were thrown in his way, fully sustain the Board's conclusion. *N. L. R. B.* v. *Mt. Clemens Pottery Co.*, 147 Fed. (2d) 262, 264, C. A. 6th; *Atlas Underwear Co.* v. *N. L. R. B.*, 116 Fed. (2d) 1020, 1023, C. A. 6th; *N. L. R. B.* v. *Good Coal Co.*, 110 Fed. (2d) 501, 504, C. A. 6th, cert. denied 310 U. S. 630.

We are also of the opinion that the foregoing facts sustain the Board's ruling that the Respondent refused to bargain collectively with the representatives of his employees and thereby violated § 8 (a) (5) of the Act.

In contesting the ruling, Respondent points to the numerous meetings held with the Union committee, and to the fact that the Act, although requiring collective bargaining, does not compel the making of any agreement between employer and employees. *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 45, 57. Just recently, and after this case was argued and submitted, the Supreme Court decided the case of *N. L. R. B. v. American National Insurance Co.*, May 26, 1952, in which it restated the ruling in the *Jones & Laughlin* case and held that the employer's insistence upon the inclusion of a management functions clause in the bargaining contract was not in itself a refusal to bargain collectively. However, the Court also pointed out that "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences," that the good faith test of bargaining was retained in the Labor-Management Relations Act of 1947, and that good faith is determined by a consideration of the facts of each case. Respondent's actions, particularly with respect to vacations and wage proposals, furnish a reasonable basis for the conclusion reached by the Board.

The Respondent also refused to bargain with Grimes as a member of the Union's committee. In *N. L. R. B. v. Kentucky Utilities Co.*, 182 Fed. (2d) 810, C. A. 6th, we recognize the right of management to refuse to bargain with a certain representative of the Union under unusual facts clearly justifying such refusal. But the facts in this case fall far short of the facts therein involved. The employees have the right to choose their own bargaining representative. The evidence fails to sustain Respondent's contention that Grimes was not authorized to bargain for the Union. In *N. L. R. B. v. Kentucky Utilities Co., supra*, we held that the Act does not require that the bargaining representative be em-

ployed by the Company with which the Union is bargaining. The Respondent's President had invited Grimes to address the employees at a meeting the day before the election and had introduced him as the Union's representative. Grimes' authority to represent the employees was not challenged at the first bargaining conference. Respondent's actions in this respect were a clear violation of the Act. *N. L. R. B.* v. *Jones & Laughlin*, 301 U. S. 1, 45; *N. L. R. B.* v. *New Era Die Co.*, 118 Fed. (2d) 500, 504, C. A. 3rd; *N. L. R. B.* v. *Blanton Co.*, 121 Fed. (2d) 564, 571, C. A. 8th; *N. L. R. B.* v. *Sunbeam Electric Manufacturing Co.*, 133 Fed. (2d) 856, 860, C. A. 7th.

The Respondent also refused to bargain collectively after the strike was in effect. The duty to bargain collectively continues even though a strike is in progress. *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345; *Amalgamated Association, Bus Employees* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 390.

Respondent vigorously contends that the striking employees ceased to be employees, with the result that there was no duty on its part to thereafter bargain with them, nor to reinstate them in their former positions when they later applied for reinstatement. The soundness of this contention depends upon the nature of the strike. If the strike was one in violation of the Union's contract with the Respondent, or one not authorized by the National Labor Relations Act, there was no duty on the part of the Respondent to consider the strikers as employees. *N. L. R. B.* v. *Sands Manufacturing Co.*, 306 U. S. 332, 343-344; *Southern Steamship Co.* v. *N. L. R. B.*, 316 U. S. 31, 46-48; *N. L. R. B.* v. *Bradford Dyeing Association*, 106 Fed. (2d) 119, C. A. 1st; *Hamilton* v. *N. L. R. B.*, 160 Fed. (2d) 465, 469, C. A. 6th. However, if the employees ceased work as a consequence

of, or in connection with, any current labor dispute, or because of any unfair labor practice, they continued as employees of the Respondent, even though not working while the strike was in progress. § 152 (3), Title 29 U. S. Code; *N. L. R. B.* v. *Mackay Radio and Telegraph Co., supra*, 304 U. S. 333, 347; *N. L. R. B.* v. *Ohio Calcium Co.*, 133 Fed. (2d) 721, 726, C. A. 6th; *Hamilton* v. *N. L. R. B.*, 160 Fed. (2d) 465, 468, C. A. 6th.

Respondent contends that the strike was not the result of a labor dispute, but was called by Bellew because of his personal inconvenience and anger at not being notified of the postponement of the meeting set for May 26th. The Board found that the Conciliator was responsible for the postponement and that the Respondent was not at fault in the failure of the Union to receive notice. However, it also held that the postponement of the meeting was not the sole cause of the strike, that at most, Respondent's proof tended to establish that the postponement of the meeting touched off the strike, and that considering the events in their entirety, of which the postponement of the meeting was but a single incident, the Respondent's unfair labor practices and the employees' economic demands were the real causes of the strike. We approve the ruling. It was the view of the Union membership on May 7th that "We have gone as far as we can get in negotiations," and a strike was authorized at that time. Whatever single event thereafter was responsible for the effective date of the strike, it in no way eliminates the fundamental fact that the parties were involved in a labor dispute and the failure to reach a settlement was the real cause of the strike. The lack of justification on the part of the employees in attributing to Respondent an unreasonable or arbitrary attitude in connection with the negotiations does not negative the fact that the strike occurred as a consequence of a current labor

dispute. Fault on the part of the Respondent is not a necessary element. *N. L. R. B. v. Mackay Radio and Telegraph Co., supra*, 304 U. S. 333, 344; *N. L. R. B. v. Stackpole Carbon Co.*, 105 Fed. (2d) 167, 176, C. A. 3rd.

The failure of the Union, in calling the strike, to comply with the provisions of its constitution did not make the strike an illegal one under the National Labor Relations Act. The Act guarantees to the employees the right to strike. § 163, Title 29, U. S. C. The provisions of the Union's charter can not abridge that right. *N. L. R. B. v. Star Publishing Co.*, 97 Fed. (2d) 465, 470, C. A. 9th; *International Union, Automobile Workers v. O'Brien*, 339 U. S. 454.

The picketing was accompanied by disorder and some violence. At its inception there was a crowd around the entrance to the plant. There was some calling of names and angry remonstrance on the part of some of the strikers against some employees who did not join the strike. There was some personal interference with some of the non-strikers. At the request of the Respondent some policemen were assigned to the immediate area, although none of them were later called as witnesses. During the course of the strike, Harry Bennett, president of the local, made insulting remarks to employees as they left the plant, and threw one or two bricks at an employee named Reynolds. During the night a glass pane in the front entrance and a window in the upper floor were broken by bricks thrown by unidentified persons. Respondent contends such conduct forfeited any right of reinstatement which the strikers would otherwise have had. *N. L. R. B. v. Fansteel Corp.*, 306 U. S. 240; *N. L. R. B. v. Ohio Calcium Co., supra*, 133 Fed. (2d) 721, 727-728, C. A. 6th. We agree with and approve the rule stated in those cases. But unauthorized acts of violence on the part of individual strikers are not chargeable to

other Union members in the absence of proof that identifies them as participating in such violence. *N. L. R. B. v. Ohio Calcium Co., supra*, 133 Fed. (2d) 721, 726, C. A. 6th; *N. L. R. B. v. Mt. Clemens Pottery Co., supra*, 147 Fed. (2d) 262, 268, C. A. 6th; *Republic Steel Corp. v. N. L. R. B.*, 107 Fed. (2d) 472, 479, C. A. 3rd; *N. L. R. B. v. Stackpole Carbon Co., supra*, 105 Fed. (2d) 167, 176-177, C. A. 3rd. See *United Brotherhood of Carpenters v. United States*, 330 U. S. 395, 403. Although these rulings were prior to the enactment of Section 2 (13) of the Labor-Management Relations Act, 152 (13), Title 29, U. S. C., we believe they are applicable on review, where the Board has found that agency did not exist. The Board found that much of the disorder and violence was on the part of former employees who had been discharged for cause and whose reinstatement is not in issue, as in the cases of Bennett, Powley, Brooks and Depriest; that none of the 66 employees engaged in unlawful mass picketing; that some of the misconduct was by unidentified persons; that other misconduct on the part of individual strikers was not the type of misconduct which would warrant denial of reinstatement; and that the 66 striking employees were entitled to reinstatement. We agree with the findings and ruling except in the cases of Harold E. Medley, Guy Phelps, Vera Mae Tucker, and Alice Kelley. In our opinion, the conduct of these four striking employees was such as to justify a denial of their reinstatement.

Respondent also argues that the right of reinstatement was forfeited by the act of the Union in extending the picket line so as to include adjoining property owned by Respondent, on which a new plant was being constructed for Respondent by independent contractors, Vandeveldе and Augustus. It contends that the picketing of this property caused the construction work to be

discontinued because the employees of the contractor refused to cross the picket line, which constituted a "secondary boycott" prohibited by § 8 (b) (4) (A) of the Labor Management Relations Act; § 158 (b) (4) (A), Title 29 U.S.C.A.; *N. L. R. B.* v. *Denver Building Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, 341 U. S. 694; *Carpenter's Union* v. *N. L. R. B.*, 341 U. S. 707.

The Examiner doubted the legal sufficiency of such a defense, but did not rule on the question, as he was of the view that the alleged defense was factually without merit. He found that the only occasions when the construction workers ceased work as a result of picketing were those when pickets of the Teamsters Union, with whom the contractor had a labor dispute, picketed the construction site, and that the cessations of work were caused by that organization and not by the Union involved in this proceeding. The Board found it necessary to adopt this finding, as in its opinion the picketing was confined to the Respondent's immediate premises and was all primary picketing. This was in accord with the ruling of the Kentucky Court of Appeals in *Boyd* v. *Decca Artware*, 239 S. W. 86, 90, in which the Court declined under the applicable State law to enjoin picketing of the construction site. But in that case the Court did not have under consideration the effect of the Labor Management Relations Act, and for that reason the case does not present the same issues as is presented here.

The "secondary boycott" feature of the labor dispute herein involved is the chief issue in the case of *The United Brick & Clay Workers of America, etc.* v. *Decca Artware, Inc.*, No. 11403, on this docket, a companion case to this case, arising out of the same labor dispute, and in which an opinion is being handed down at this time. A more extended discussion of the issue is made in

the opinion in that case, and need not be repeated here. As shown by that opinion, we do not agree with the ruling of the Board as a matter of law, and are of the opinion that whether the Union was guilty of a "secondary boycott" contrary to the provisions of [illegible] (A) of the Labor Management Relations Act was a factual question for determination under the particular facts of the case. The Examiner found in favor of the Union. The finding is supported by substantial evidence on the record considered as a whole, and is accepted on this review. Accordingly, it becomes unnecessary to consider the legal sufficiency of Respondent's defense on this phase of the case.

The order of the Board will be modified as herein indicated, and enforcement of it as so modified will be decreed.

(2)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11156

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INC., RESPONDENT

MOTIONS FOR RULE TO SHOW CAUSE AND RESTRAINING ORDER.

Decided November 10, 1953.

Before SIMONS, Chief Judge; MARTIN and MILLER, Circuit Judges.

MILLER, Circuit Judge. On July 30, 1952, this Court sustained the petition of the National Labor Relations Board in this case for enforcement of its order of October 25, 1949, which among other things ordered that the respondent, Deena Artware, Inc., reinstate certain employees alleged to have been discriminatorily discharged and to make them whole for lack of pay suffered by reason of such discharge. *N. L. R. B. v. Deena Artware, Inc.*, 198 Fed. (2d) 645. Certiorari was thereafter denied by the Supreme Court. 345 U. S. 906. The amount due the employees is unliquidated, depending upon several unknown factors which will have to be determined by further proceedings before the Board. The Board estimates the amount to be approximately $150,000.

In another case, *United Brick & Clay Workers, et al. v. Deena Artware, Inc.*, Deena Artware recovered a judgment in the U. S. District Court for the Western

District of Kentucky against the United Brick and Clay Workers Union and the American Federation of Labor in the amount of $29,985.85, for damages resulting from an illegal secondary boycott. That judgment was affirmed by this Court on July 30, 1952, No. 11,103, 198 Fed. (2d) 637. Certiorari was thereafter denied by the Supreme Court., 344 U. S. 897, 919. When the appeal was taken from the District Court to this Court, the judgment was superseded by depositing with the Clerk of this Court certain United States Government Bonds in the par value of $45,000. Since the affirmance of the judgment, United Brick & Clay Workers and the American Federation of Labor have paid in to the Clerk of this Court the sum of $34,404.61, which was in full of the judgment with interest thereon to date of payment, and unpaid court costs. The bonds were thereupon returned to the depositors. On December 15, 1952, Deena Artware executed two assignments with respect to its interest in this judgment, one of these assignments in the amount of $15,000 being made to Deena Artware's attorney for legal services, and the other assignment, covering the balance of the unpaid judgment, being made to Deena Products Company, of which Deena Artware is a subsidiary, in part payment of an alleged indebtedness owing by Deena Artware to Deena Products Company. The assignees are asking that the proceeds of the judgment be distributed to them according to their respective interests.

The Board has moved in this action for (1) a temporary restraining order enjoining Deena Artware, Deena Products Company and George H. Weiner, who is the President of both Companies, from giving effect to the assignment to Deena Products Company; (2) that the Government Bonds held by the Clerk, or the proceeds therefrom, to the extent of the amount of the assignment to Deena Products Company, be impounded and not

paid over either to Deena Artware or Deena Products Company, and (3) that a rule issue directing Deena Artware, Deena Products Company and Weiner to show cause why an order should not issue requiring them, and each of them, to produce and permit the Board to inspect and copy the books and records which show the transactions between Deena Artware and Deena Products Company, for the purpose of determining whether the affairs of Deena Artware are being operated for the purpose of rendering it without funds to satisfy the back-pay obligation under the Board's order as enforced by this Court, and whether the assignment was without valid consideration. The motion alleges that Deena Products Company is substantially owned and completely controlled by Weiner who also controls and is President of Deena Artware; that by reason of his dominant position in these corporations he is able to control the financial transactions between them which occur in the course of their related activities, and to direct the flow of assets into each of them; that there is reason to believe that Deena Artware does not have sufficient funds with which to satisfy its back-pay obligation; that the assignment to Deena Products Company was made without valid consideration; that Weiner had made the statement that the discharged employees would never collect any portion of their back-pay claim, in that he would protract the litigation as long as possible and would place the Company in bankruptcy if litigation over the back-pay claims went against him; that the Board's regional office had requested Deena Artware to give assurances that funds would be available to meet the back-pay obligation when the time arrived for payment; that Deena Artware had replied that "under the circumstances, we are not able to give you assurances that funds will be available to meet the demands, the amount of which is unknown to

us"; that Deena Artware has engaged in a course of depleting its assets in order to avoid payment of the back-pay award, and that there is immediate danger that the funds held as security for the judgment debt owed Deena Artware in case No. 11,430 will be paid over to Deena Products Company unless they are impounded by this Court. Affidavits were filed in support of these allegations. Deena Artware has objected to the motion, and although admitting the execution of the assignments, and that it made the statement that it could not give assurances that funds would be available to meet the back-pay demands, has denied that the assignment to Deena Products Company was without consideration or that Deena Artware was engaged in a course of depleting its assets in order to avoid payment of the back-pay award. It has filed counter-affidavits in support of its position.

Petitioner did not challenge the validity of the assignment to respondent's attorney. Irrespective of the assignment, the attorney has an equitable lien on the proceeds of the judgment for the amount of his fee, which is superior to any claim of the discharged employees. § 30.200 Ky. Revised Statutes; *Brown* v. *Ingram's Ex'x*, 229 Ky. 703. The amount covered by that assignment has been paid to the attorney.

The jurisdiction of this Court in the present proceeding is that conferred by Sec. 160(e), Title 29, U. S. Code, under which the Court is empowered to enter "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board," together with the granting of such temporary relief or restraining order as it deems just and proper. That jurisdiction has been exercised by its order enforcing the decree, entered July 30, 1952, followed by the issuance of its mandate on October 7, 1952. The supplemental relief now sought by the petitioner was applied

for on April 9, 1953, based largely upon the assignments executed by the respondent on December 16, 1952, several months after this Court had entered its final order and disposed of the case. We are of the opinion that the issue presented by the present application is not one of which this Court should taken jurisdiction at the present time.

The contest between the Board and the respondent has now developed into a controversy between creditors. The claims of the discharged employees are unliquidated. Although the legal basis of liability has been determined, actual liability to any individual employee has not yet been established. Facts yet to be developed will determine whether any particular employee has suffered any damage by the wrongful discharge, and, in any event the exact amount of such damage. *Nathanson* v. *N. L. R. B.*, 344 U. S. 25, 29-30. The claims, whether enforced by the employees or by the Board as their agent, are not lien claims and are not entitled to priority over the claims of other creditors in the event of the debtor's insolvency. *Nathanson* v. *N. L. R. B.*, supra. If one creditor is improperly or fraudulently obtaining an advantage over another creditor there are available to the complaining creditor common law or statutory remedies in courts of original jurisdiction, independent of equitable action by this Court, for the protection of his interests. The questions involved in controversies between creditors of the same debtor who has insufficient assets to pay both creditors in full are both factual and legal, and on the factual side usually require the taking of proof and the facilities of a trial court. The Board should avail itself of such remedies and facilities for the enforcement or protection of its claim before attempting to invoke the equitable jurisdiction of this Court for that purpose. *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497; *Ten-*

nessee Publishing Co. v. *Carpenter*, 100 Fed. (2d) 728, 732, C. A. 6th; *Hoehn* v. *Crews*, 144 Fed. (2d) 665, 670, C. A. 10th, affirmed, 324 U. S. 200; *White* v. *Croker*, 13 Fed. (2d) 321, 323, C. A. 5th; cert. denied, 273 U. S. 715; *American Mine Equipment Co.* v. *Illinois Coal Corp.*, 31 Fed. (2d) 507, 511, C. A. 7th, cert denied, 280 U. S. 572.

Petitioner, apparently recognizing the force of these objections, contends that the Court should act to prevent contempt of its order of enforcement, and cites instances in which we have acted in Labor Board cases involving contempt. In the present case, the respondent has not disobeyed any order of the Court. A statement of probable financial inability to pay claims of a substantial amount, possibly totaling $100,000 though still unliquidated, is not contempt of Court. Whether the respondent will be guilty of contempt after the claims are liquidated is problematical. The amount of the liability may prove to be relatively small; payment may in any event be made; the alleged purpose to wilfully defeat the payment is denied by the respondent. We will not assume that the respondent will at some distant time in the future act in contempt of the Court's order, and do not believe that such a controverted issue should be litigated in this Court at the present time. It will be time enough to rule on any question of contempt when the order to pay becomes liquidated and final. If, at that time, any financial inability on the part of the respondent to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken. *Fleming, Admr.* v. *North Georgia Mfg. Co.*, 33 Fed. Supp. 1005, N. D. Ga.; *In re Byrd Coal Co. Inc.*, 83 Fed. (2d) 256, C. A. 2d. Compare *United States* v. *Fleischman*, 339 U. S. 349, 356-357.

The contempt power of the Court should be exercised with caution. *In re J. H. Small Shoe Co.*, 13 Fed. (2d)

143, 144, D. C. Conn.; *United States* v. *Moore*, 294 Fed. 852, 856-857, C. A. 2d; *Redman* v. *United States*, 77 Fed. (2d) 126, 127, C. A. 9th. Its exercise in any particular instance lies within the discretion of the court. *Miller* v. *Zaharias*, 168 Fed. (2d) 1, 3, C. A. 7th, cert. denied, 335 U. S. 823; *In re Sobol*, 242 Fed. 487, 489, C. A. 2d. We do not deem it advisable in a case of this nature to exercise the contempt powers of the Court at this time in anticipation of an act of contempt that may not occur, particularly where the effect of the proposed action would be to give the petitioner an unjustified priority over the claims of other creditors of equal rank.

The motions of the National Labor Relations Board are denied.

(3)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11,156

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INCORPORATED, RESPONDENT

SUPPLEMENTAL DECREE

December 16, 1955

Before MARTIN, MILLER and STEWART, Circuit Judges.

This Court having on July 30, 1952, handed down its decision enforcing an order of the National Labor Relations Board, which directed, among other things, that the respondent, Deena Artware, Incorporated, Paducah, Kentucky, its officers, agents, successors and assigns make whole certain named employees for loss of pay suffered by reason of unlawful discrimination against them; and the Board having then held a further hearing and having issued its supplemental Decision and Order; and the Board having thereafter moved this Court for the entry of a supplemental decree specifying the amounts of back pay due said employees;

And the Court being of the opinion that jurisdiction to grant said motion and to enter this supplemental decree is conferred by Sec. 160(e), Title 29, U. S. Code; *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 197-200; *N. L. R. B.* v. *Cambria Clay Products Co.*, 215 F. 2d 48, 56, C. A. 6th; *Marlin-Rockwell Corp.* v. *N. L. R. B.*,

133 F. 2d 258, 260, C. A. 2nd; *Home Beneficial Life Ins. Co.* v. *N. L. R. B.*, 172 F. 2d 62, C. A. 4th;

And that the findings of the Board are supported by substantial evidence on the record considered as a whole, and that the formula used by the Board in computing the amount of back pay was within the discretionary power of the Board, was not arbitrary, and bears an appropriate relation to the policies of the Act; *N. L. R. B.* v. *Seven-Up Bottling Co.*, 344 U. S. 344; *Phelps Dodge Corp.* v. *N. L. R. B.*, *supra*; *Marlin-Rockwell Corp.* v. *N. L. R. B.*, *supra*, p. 260;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent, Deena Artware, Incorporated, Paducah, Kentucky, its officers, agents, successors and assigns, shall:

(a) Pay to the employees named in the Appendix attached hereto, who were found to have been discriminated against by a Board Decision and Order issued October 25, 1949, as enforced by this Court, net back pay in the amounts set out in the Appendix.

(4)

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 11156

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

DEENA ARTWARE, INCORPORATED, RESPONDENT

MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS

Decided January 17, 1958

Before MARTIN, MILLER and STEWART, Circuit Judges.

MILLER, Circuit Judge. On July 30, 1952, this Court entered its decree enforcing an order of the National Labor Relations Board directing, inter alia, that 56 employees be made whole for losses sustained as a result of discrimination against them by the respondent arising out of a strike. *N. L. R. B.* v. *Deena Artware, Inc.*, 198 F. (2d) 645, cert. denied, 345 U. S. 906.

On December 16, 1955, this Court entered a supplemental decree enforcing the Board's back pay determination and directing the respondent to pay to named employees specific amounts of back pay, which totaled approximately $300,000.00. *N. L. R. B.* v. *Deena Artware, Inc.*, 228 F. (2d) 871.

The respondent has not made the payments so ordered. It contends that it was forced by economic conditions and this labor dispute, see *United Brick & Clay Workers of America* v. *Deena Artware, Inc.*, 198 F. (2d) 637, C. A. 6th, cert. denied, 344 U. S. 897; *Deena Products Co.* v. *United Brick & Clay Workers of America*, 95 F.

(2d) 612, C. A. 6th, to discontinue the operation of its plant during the year 1953, that it is financially unable to make the payments, and that there are no assets available for that purpose. It contends that whatever assets were available for creditors have through bona fide business transactions been used in the payment of, or to secure the payment of, its legal obligations.

The Board contends that the respondent, Artware, and several affiliated corporations were and are integral parts of a single enterprise substantially owned and controlled by George H. Weiner, president and treasurer of Artware; that the operations of Artware were conducted in a manner which prevented it from having assets, and thereby prevented compliance with the back pay provisions of the decrees; that Artware's assets were siphoned off or transferred to affiliated companies, in consequence of which it appeared that Artware was left with no assets with which to comply with the decree; that the affiliated corporations are *alter egos* and/or successors to Artware within the meaning of the decrees; and that the aforesaid George H. Weiner and the affiliated corporations referred to above are subject to the back pay provisions of the decrees and responsible for the failure to comply therewith, and liable for payment of said back pay.

The Board has filed a motion that the respondent and the several affiliated corporations be directed to produce and permit the Board to inspect, copy and photograph numerous books, records, bank statements and types of papers and documents which would show the financial condition of the respondent and the respective obligations and credits rendered between respondent and the affiliated corporations. It also asked that certain present or former officers of respondent and the affiliated corporations be directed to give depositions taken upon oral examination by the petitioner with respect to

the financial ability of the respondent to comply with the provisions of the supplemental decree and the dealings and relationship of respondent with said affiliated corporations.

The respondent has filed a response objecting to the motion, which reviews the litigation arising out of the strike, its unsuccessful attempt to meet the problems caused by the strike resulting in discontinuance of operations at its plant during the year 1953, the financial transactions entered into in connection therewith, and its resulting financial inability to make the payments to its employees as directed by the supplemental decree.

The present motion is not in support of any contempt proceeding, as was the case in *N. L. R. B.* v. *Parsons Punch Corporation*, No. 12,244, decided by us on October 11, 1957. *Bethlehem Shipbuilding Corp.* v. *N. L. R. B.*, 120 F. (2d) 126, C. A. 1st, and *N. L. R. B.* v. *Remington Rand, Inc.*, 130 F. (2d) 919, C. A. 2nd, which are relied upon by petitioner, also involved contempt proceedings. Nor were the issues in those cases an alleged financial inability to pay. No contempt of court has been charged in the present case. We recognize that in some instances certain proceedings by the Board, not recognized at common law, are approved by the Courts for the purpose of effectuating the public purposes of the Act. *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362; *Consumers Power Co.* v. *N. L. R. B.*, 113 F. (2d) 38, 44, C. A. 6th. Contempt proceedings may come under that head, although we are not called upon to decide that question in the present proceeding. If this proceeding was to give effect to the declared public policy of the Act, we would have a different question to consider from what is now before us. But, in the absence of contempt proceedings, the present proceeding is purely a proceeding for the enforcement of private individual

rights, namely, an attempt to collect from an insolvent corporation money judgments running in favor of private individuals. As the Supreme Court said in *Nathanson* v. *N. L. R. B.*, 344 U. S. 25, 28, "The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate."

As pointed out in the *Nathanson* case, 344 U. S. 25, 27-28, the beneficiaries of the back pay awards are private persons for whom the Board is acting as agent. The claims have no status or priority different from that enjoyed by other unpaid wage claims. As stated by the Supreme Court in *National Licorice Co.* v. *N. L. R. B.*, supra, 309 U. S. 350, 362, "The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights." In *Amalgamated Utility Workers (C. I. O.)* v. *Consolidated Edison Co.*, 309 U. S. 261, 267, the House Committee Report is quoted as saying, "No private right of action is contemplated." In *Agwilines, Inc.* v. *N. L. R. B.*, 87 F. (2d) 146, 150, C. A. 5th, the Court said, "The proceeding is not, it cannot be made, a private one to enforce a private right. It is a public procedure, looking only to public ends." This Court has recognized and referred to the fact that the Board does not exist for the adjudication of private rights. *N. L. R. B.* v. *Hudson Motor Car Co.*, 136 F. (2d) 385, 387, C. A. 6th; *Consumers Power Co.* v. *N. L. R. B.*, supra, 113 F. (2d) 38, 41, C. A. 6th.

We are urged, however, to treat this motion for practical purposes as being in support of a proceeding for contempt, in that it will enable the Board to determine from a consideration of the evidence made available by the motion whether probable cause exists for instituting contempt proceedings. But orderly procedure does not consist in the taking of depositions and the compulsory

production of books and records for examination by a claimant *before* the claimant files his complaint or pleading setting out the facts constituting his alleged cause of action. Whether the facts as claimed by the Board would as a matter of law constitute contempt of court is a legal question which the respondent is entitled to have decided before he is put to the expenditure of considerable time and money in producing the evidence out of which the claimant hopes to sustain his allegations. Probable legal issues are apparent. Is the fraudulent concealment of assets in order to avoid payment of the award contempt of court? Apparently, fraudulent concealment in the true sense of the words is not claimed in the present case. Is the inability to pay merely by reason of the payment of other creditors contempt of court? If so, is it limited to payments made subsequent to the rendition of the award, or does it include payments to other creditors made prior to the rendition of the award? If limited to the first classification, should not the scope of the motion for discovery and inspection of documents be likewise limited as to the period of time involved? The present motion asks for numerous records from April 5, 1948 to date. We do not attempt at this time to answer such questions as they have not been presented to us in the present proceeding, but such questions and other analogous ones point up the advisibility of requiring the Board to definitely state its claim by an appropriate motion or pleading, the validity of which can then be questioned as a matter of law by the respondent, before the Board is authorized to start on the extensive and expensive discovery proceedings it is now seeking to undertake.

The present motion raises an issue not materially different from that previously raised by the Board in this same case and decided by this Court in *N. L. R. B.* v. *Decca Artware, Inc.*, 207 F. (2d) 798, C. A. 6th. There

the claims of the discharged employees were still unliquidated. In the present proceeding they have become liquidated. As pointed out in that case the jurisdiction of this Court under Sect. 160(e), Title 29, U. S. Code, is to enter "a decree enforcing, modifying, and enforcing as so modified, or in setting aside in whole or in part, the order of the Board" together with the granting of such temporary relief or restraining order as it deems just and proper. That jurisdiction has been exercised by our decree of enforcement of July 30, 1952, and our supplemental decree of December 16, 1955, which changed the unliquidated claims of the discharged employees into liquidated ones. In the absence of contempt proceedings, we do not find that jurisdiction is conferred upon us to order and supervise discovery proceedings in the appellate court for the purpose of enforcing a monetary award running in favor of a private individual, even though the award has received its vitality from a previous decree of this Court. Certainly, it is not customary for an appellate court to retain jurisdiction of a cause which it has decided in order to be assured that its judgment or decree will be subsequently carried out by the parties. Eliminating any issue of contempt, what we said in our earlier opinion in this case, 207 F. (2d) 798, would seem to be just as applicable to a liquidated claim as to an unliquidated one. We repeat: "If one creditor is improperly or fraudulently obtaining an advantage over another creditor there are available to the complaining creditor common law or statutory remedies in courts of original jurisdiction, independent of equitable action by this Court, for the protection of his interest. The questions involved in controversies between creditors of the same debtor who has insufficient assets to pay both creditors in full are both factual and legal, and on the factual side usually require the taking of proof and the facilities of a trial

court. The Board should avail itself of such remedies and facilities for the enforcement or protection of its claim before attempting to invoke the equitable jurisdiction of this Court for that purpose." See cases cited in support. We consider that to be the law of this case. *Mayflower Hotel Stock S. P. Committee* v. *Mayflower Hotel Corp.*, 193 F. (2d) 666, 669, C.A.D.C., *United States* v. *Wainer*, 240 F. (2d) 595, 596, C. A. 7th.

It is argued that thus relegating the collection of these awards to courts of original jurisdiction will result in irreparable injury to the claimants because of lack of authority on the part of the Board to institute proceedings in such courts. To what extent, if any, the Board may be restricted in attempting to collect these awards through court processes normally available to unpaid judgment creditors, is an open question which we will not attempt to decide in this case. But it is to be noticed that such a restriction was not suggested by the Supreme Court in *Nathanson* v. *N. L. R. B.*, supra, in which the Board attempted collection of such claims in a bankruptcy proceeding. In any event, the Board is not the real party in interest but is acting as agent for the employees. *Nathanson* v. *N. L. R. B.*, supra, 344 U. S. 25, 27. It is logical to conclude that if collection of the awards is not part of the public policy of the Act, the courts are open to the claimants as individual creditors for the enforcement of their awards. If it is part of the public policy of the Act, the proper procedure would seem to be through contempt proceedings, by which the issue would be raised whether the allegations of the pleading legally constitute contempt. *Amalgamated Utility Workers (C. I. O.)* v. *Consolidated Edison Co.*, supra, 309 U. S. 261, 269-270.

Petitioner's motion is overruled.

STEWART, Circuit Judge, dissenting. The denial of the present motion for discovery seriously impairs the effectiveness of the Board as the agency primarily responsible for the administration of the National Labor Relations Act. The alternatives now left to the Board appear to be neither desirable nor practical.

It is suggested by the majority that the motion might be proper if the Board should institute contempt proceedings against the respondent. But, if the Board is denied access to the respondent's records, it will probably be impossible to determine before such proceedings are begun whether the enforcement order of this court is actually being flaunted so as to warrant the charge of contempt.

In *N. L. R. B.* v. *Deena Artware, Inc.*, 207 F. (2d) 798, 802, this court said, "It will be time enough to rule on any question of contempt when the order to pay becomes liquidated and final. If, at that time, any financial inability on the part of the respondent to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken." The back-pay awards having now become liquidated and final, it seems to me that in conformity with these words of the court's previous opinion the Board should now be given an opportunity to ascertain before bringing contempt proceedings whether the respondent has in fact been guilty of the improper actions alleged. *N. L. R. B.* v. *Dixon*, 189 F. (2d) 38 (8 Cir., 1951). That would appear preferable to requiring the Board to bring a contempt action, and only then allowing it to determine whether the facts show probable cause.

But it is with the alternative suggestion of my brothers that I have a more basic difficulty—the suggestion that the Board proceed in a trial court as an

ordinary judgment creditor. This difficulty stems from a fundamental difference in our concepts as to the nature of the jurisdiction conferred upon this court by Section 10 (e) of the National Labor Relations Act, 29 U. S. C. A., § 160 (e). It is of course true, as the majority opinion points out, that an appellate court does not customarily retain jurisdiction of a case in order to insure that its judgment will be carried out by the litigants. That function is ordinarily performed by the *nisi prius* court from which the appeal came, since that court possesses power to compel obedience to a judgment.

But in exercising the statutory jurisdiction conferred upon it by Section 10 (e) of the Act, this court does not serve as an appellate court. In a very real sense, the jurisdiction conferred by that section is original jurisdiction. Certainly it is original (and exclusive) judicial jurisdiction. No power to enforce an order is conferred upon the Board itself, nor upon courts generally. *Myers v. Bethlehem Corp.*, 303 U. S. 41, 48-9 (1938). To what court is it contemplated that the Board should now turn?

Even if the Board could properly now institute a trial court proceeding, the object of such a proceeding could only be the effectuation of the enforcement decree of this court. The effectuation of that decree is the proper business of this court alone. Whether or not the Board is called a judgment creditor of the respondent, any action taken in a trial court would stem solely from the enforcement decree of this court, whose function it is to retain jurisdiction to administer all necessary further relief. See *N. L. R. B. v. Sunshine Mining Co.*, 125 F. (2d) 757, 760-761 (9 Cir., 1942); cf. *N. L. R. B. v. Underwood Machinery Co.*, 198 F. (2d) 93 (1 Cir., 1952).

Nathanson v. N. L. R. B., 344 U. S. 25 (1952), does not

seem to me to imply a contrary conclusion. There the Board was permitted to prove an enforced back-pay award as a claim in the employer's bankruptcy proceeding. It is true that the Court spoke of the bankruptcy action as a "contest . . . between various classes of creditors," including the Board, but that case does not go so far as to hold that the Board is to be treated as an ordinary judgment creditor whenever it attempts to effectuate an enforcement decree. Moreover, there is no contest between creditors here. The controversy is solely between the respondent and the Board. Thus the motion for discovery is not merely an attempt by one judgment creditor to determine whether he is being defrauded by an illusory transfer of assets; it is, rather, an attempt by the Board to determine the sole remaining issue in dispute—whether the respondent's failure to comply with the decree of this court was occasioned by genuine financial inability.

My colleagues suggest that if the Board itself is unable to institute an action for the collection of back-pay awards, the courts would be open to the individual claimants to secure enforcement of their awards. This suggestion seems completely at odds with the decisions cited in the majority opinion which hold that the Act does not create a private right of action. A private party has no standing either to institute proceedings to enforce an order of the Board or to secure implementation of a Board order which has been upheld by a court of appeals. *Amalgamated Utility Workers* v. *Edison Co.*, 309 U. S. 261 (1940); *National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362 (1940); see also *Stewart Die Casting Corp.* v. *N. L. R. B.*, 132 F. (2d) 801 (7 Cir., 1942).

Finally, today's order seems to me inconsistent with the recent order of this court in *N. L. R. B.* v. *Parsons Punch Corp.*, . . . F. (2d) . . ., (October 11, 1957).

While it is true that the Board initiated contempt proceedings in the *Parsons* case, we held those proceedings in abeyance to give the Board an opportunity, by way of the discovery procedure there ordered, to determine whether the respondent in that case was in fact guilty of substantially the same kind of conduct as that alleged here.

I would grant the motion.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. 790

NATIONAL LABOR RELATIONS BOARD, - Petitioner,

vs.

ARENA ARTWARE, INCORPORATED, ET AL. - - - - - - - - Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES G. WHEELER,
c/o Wheeler & Marshall,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky.

MERVIN N. BACHMAN,
c/o Arvey, Hodes & Mantynband,
One La Salle Street,
Chicago, Illinois,
Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
c/o Wheeler & Marshall,
[illegible] & Tr. Bldg.,
[illegible]

SIDNEY R. ZATZ,
c/o Arvey, Hodes & Mantynband,
[illegible]

PRESENTED BY BONTE CO. INCORPORATED LOUISVILLE, KY.

INDEX.

PAGE

Questions Presented 1

Counter-Statement of Facts 2

History of Deena Artware 4

The Assignments of the Judgment 7

Reasons for Denying the Writ:

No Contempt of Any Existing Decree 9

Other Respondents Not Guilty of Contempt 11

Petitioner as a Creditor Cannot Invoke Remedy of Contempt 14

Supplemental Hearing Procedure to Fix Back Pay Wholly Discretionary With Petitioner 16

Use of Such Procedure Inequitable on Facts of This Case 16

Conclusion 17

CITATIONS.

PAGE

2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed., 1871) 10

Deena Products Company v. *United Brick & Clay Workers*, 195 F. 2d 612 ..... 4, 7, 8

Nathanson v. *N. L. R. B.*, 344 U. S. 25 14

N. L. R. B. v. *Deena Artware*, 207 F. 2d 798 7

N. L. R. B. v. *Deena Artware*, 251 F. 2d 183 8

N. L. R. B. v. *New York Merchandise Co.*, 134 F. 2d 949 9

Regal Knitwear, 324 U. S. 9 13

United Brick & Clay Workers v. *Deena Artware*, 198 F. 2d 645 4

IN THE

Supreme Court of the United States

October Term, 1958.

No. 790

NATIONAL LABOR RELATIONS BOARD, - *Petitioner,*

v.

DEENA ARTWARE, INCORPORATED, ET AL., - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED.

1. Whether Deena Artware, Inc., hereinafter called Artware, is in civil contempt of a decree of the Court below entered December 16, 1955. As will be shown, the complaint of petitioner below was of acts of Artware alleged to have taken place in 1948 and 1949, and not as stated in the petition, of acts alleged to have taken place between the date of entry of the decree enforcing the Board's original unliquidated back-pay order and the entry of the decree fixing specific amounts.

2. Whether the named respondents other than Artware are in civil contempt either as (a) the *alter egos* of Artware, or (b) as its successors and assigns.

3. Another question, which the petitioner has been unwilling to stress, is whether the indebtedness of Deena Artware to Deena Products Company, evidenced by the former's note of October 31, 1949, secured by a mortgage of the same date, was genuine or fictitious. Respondent contends that it was genuine and was satisfied when it matured five years later by a conveyance of the mortgaged property to the mortgagee. Petitioner apparently makes no serious contention relative to this indebtedness.

COUNTER-STATEMENT OF FACTS.

The specific allegations of the petition for adjudication in civil contempt and for other civil relief, filed before the United States Court of Appeals August 15, 1958, are set out in paragraph 5, beginning on page 6 of the petition. These allegations may be briefly summarized as follows:

A. In March, 1949, following a Labor Board hearing, Deena Products Company and its president, George Weiner, reduced prices and increased manufacturing costs for Deena Artware so as to make it show loss while Products showed profits.

B. In December, 1947, Deena Products Company, referred to as "Products", began to construct a new factory building at Paducah, Kentucky. In July, 1948, it abandoned this construction in favor of a new plant at Arlington, Kentucky. Artware was wrongfully charged with construction costs.

C. Following the abandonment of the construction of the new plant at Paducah, Products, about July, 1948, arranged for the construction of a similar plant at Arlington, Kentucky, using material bought for Deena Artware without paying Artware "any proper compensation".

D. On or about December 31, 1949, Artware executed to Products its note for $75,459.65, due in five years and secured by a lien on its property.

E. On or about December, 1952, Artware assigned to its attorneys and to Products proceeds of a judgment it had obtained against the Union. Amounts assigned were paid to the assignees.

F. After April 24, 1953, and until November 24, 1954, Sippi and Products, without payment, used Artware's plant at Paducah.

G. On or about November 24, 1954, Artware conveyed to Products all of its property in satisfaction of the indebtedness.

H. On or about May 4, 1955, the plant at Paducah was conveyed to a newly organized corporation, Industrial Realty Company.

I. Between November 24, 1954, and November 17, 1955, Sippi and Products continued to use property formerly owned by Artware.

J. On or about November 17, 1955, Industrial Realty Company leased its plant to Sippi Products.

K. Artware's indebtedness to Products was not a true and valid indebtedness. See review of petitioner's allegations of detailed facts in opinion appealed from (petitioner's appendix, pp. 26-28).

It will be noted that the material allegations against the respondent, which were denied by verified answer as hereinafter set out, are all alleged to have taken place before the United States Supreme Court on March 9, 1953, denied Artware's petition for certiorari in this proceeding. The specific allegations on which the contempt charge is based deal with acts which transpired before the entry of the first decree, July 30, 1952. The above are the allegations which were before the Court of Appeals. The statement repeated that the acts allegedly calculated to frustrate a decree for back-pay were performed in the interval between the entry of the original unliquidated back-pay decree and the entry of the supplemental decree is misleading. The conveyance of property in satisfaction of the mortgage was actually made during that interval. The questioned Mortgages, however, which have never been attacked, were executed as above stated, in October, 1949, several years before the decrees.

HISTORY OF DEENA ARTWARE.

The Court of Appeals has considered this case five times. It has also considered appeals in two companion cases growing out of a wrongful secondary boycott. (*United Brick and Clay Workers* v. *Deena Artware*, 198 F. 2d 645; *Deena Products Co.* v. *United Brick and Clay Workers*, 195 F. 2d 612. Certiorari was denied in both cases.)

The following history of Artware is designed to complement the lower court's restatement of basic facts

in the unanimous, thorough opinion appealed from (see petitioner's appendix, pp. 22-35).

The respondent, Deena Artware, incorporated in January, 1946, purchased a small pottery plant in Paducah for $65,000.00. Prior to the purchase the operation of this plant had been unsuccessful (see verified answer of Artware filed September 27, 1958, p. 16).

Artware entered into a contract for construction at a cost of approximately $83,000.00 of a new plant on adjacent vacant property, its purpose being to equip the new plant so that lamp bases made in the pottery could be turned out as finished lamps in the new plant. During the early part of 1948, United Brick and Clay Workers, hereinafter called the Union, was certified as the representative of Artware's employees. Negotiations for a labor contract followed. In the course of these negotiations, a federal conciliator inadvertently failed to notify a Union leader of a postponement of a meeting. This resulted in a strike, with the usual picketing and disorders (verified answer, pp. 17, 18).

The picketers extended their picket lines around the new construction work, though there was no dispute involving the contractors doing that work. As a result of this secondary boycott construction work was finally discontinued and the parent company, in order to minimize its loss and hold its customers, caused to be organized a new subsidiary, Deena of Arlington, which built a plant at Arlington in Carlisle County, Kentucky (see verified answer, pp. 18, 19).

Both the parent company, Deena Products Company, herein referred to as Products, and the respondent, herein called Artware, sued the Union and the A. F. of L., in the United States District Court. Both sought to recover the construction costs. Products also sought to recover the loss resulting from breakage and costs of shipment from Paducah to its Chicago plant, and the permanent loss on account of breakage and transportation incident to shipments from Paducah to the new plant at Arlington. Artware recovered only that part of the construction costs represented by the foundation for the new plant, which was and still is worthless, credited by the amount of material shipped to and used by Deena of Arlington. The trial court found that neither corporation could recover for the other items sued for, that is the costs of breakage and shipment. *The District Court held that there was no such contractual relationship between Products and Artware as would support a judgment in favor of Products.* This was affirmed by the Court of Appeals which said:

> "And it being the further view of the Court that any damages suffered by the appellant, by reason of the acts complained of, are, regardless of the liability or non-liability of the appellees to it under the provisions of the statute, section 303(a)(1) of the Labor Management Relations Act of 1947, section 187(a)(1), Title 29, U. S. Code, contingent and entirely dependent upon certain contractual relations with its subsidiary, Deena Artware, Inc., which contractual relations did not exist, and accordingly are not recoverable

in this action." *Deena Products Co.* v. *United Brick & Clay Workers, &c.*, No. 11,404, 195 F. 2d 612 (see verified answer, pp. 19, 20).

Moreover, it was shown in the trial of the above action that an effort by the parent company, Products, to show a loss for income tax purposes on account of the misfortunes at Paducah was unsuccessful, though the loss was allowed for Deena Artware (see answer, pp. 20, 21).

THE ASSIGNMENTS OF THE JUDGMENT.

On December 15, 1952, Artware assigned a part of its judgment against the Union to its attorneys and the balance to Products, the latter assignment being expressly made in part payment of its indebtedness. The Board sought to prevent the assignment to Products and asked for a rule against Products and Weiner to require them to produce and permit the petitioner to examine and copy books and records. Substantially the same charges made in the petition for adjudication filed August 15, 1958, were made in connection with petitioner's motion, denied November 19, 1953, *N. L. R. B.* v. *Deena Artware*, 207 F. 2d 798. In that opinion the Court pointed out to petitioner that its claims were not entitled to priority and that if it took the position that Products was obtaining an advantage over the creditors represented by petitioner, there were available common law or statutory remedies in courts of original jurisdiction which should be followed by it. Petitioner did not seek a review in

this Court of that judgment and the judgment is the law of the case (*251 F. 2d 183*—petitioner's appendix, p. 66).

It was plainly pointed out that petitioner should invoke and use the facilities of a trial court (see opinion, petitioner's appendix, p. 55). This admonition, repeated in subsequent arguments, has been intransigently disregarded by petitioner. We challenge the correctness of the statement that petitioner "* * * has acted conscientiously at all stages of this case in order to fulfill its statutory duty to the aggrieved employees * * *." It appears that petitioner on the other hand has disregarded the repeated admonition of the Court (see quoted reference to earlier opinion of January 17, 1958, *251 F. 2d 183*, p. 65, petitioner's appendix), and has insisted upon punitive action rather than attacking the mortgage and conveyance, or seriously questioning the validity of the indebtedness of Artware to Products.

It will thus be seen that the Court of Appeals regarded this question as to the genuineness or validity of the indebtedness as controlling and plainly and repeatedly suggested in its written opinions that it be properly explored. The unwillingness of the petitioner to follow the course suggested may be understood by reading the extensive and able cross-examination of George H. Weiner and the auditor, Appleman, in the trial of the secondary boycott case before the United States District Court. The record of this examination was before the Court of Appeals in *Deena Products Company* v. *United Brick & Clay Workers*, 195 F.

2d 612. The facts as to this indebtedness were brought out and copies of documents and of minutes of meetings of directors were filed.

REASONS FOR DENYING THE WRIT.

No Contempt of Any Existing Decree.

1. In its opinion of December 13, 1958 the court below rejected the Board's petition to adjudge the respondents in civil contempt and dismissed its motions for discovery, inspection and depositions, upon the ground that the petition did not allege facts sufficient in law to show contempt. It held that all the acts alleged to constitute the basis for contempt occurred prior to December 16, 1955—the date of the supplemental decree which fixed and made certain the back pay amounts due to the claimants and cited *N. L. R. B. v. New York Merchandise Co.*, 134 F. 2d 949, 952 CA 2d, which demonstrated that the operative decree for the purpose of proceedings in contempt was the supplemental decree of December 16, 1955. In effect, it adopted Judge Learned Hand's reasoning in the cited case that no one should be found in contempt of an order (the July 30, 1952 decree here) which did not tell him precisely what to do and stated that, since nothing occurred after December 16, 1955, there was no contempt of any decree of the court.

The petitioner now attempts to blunt the force of the decision below by maintaining that some definitive force must be attributed to the July 30, 1952 decree

even though it did not liquidate any claim due anyone. This view proceeds upon the assumption that by that decree the respondent, Artware, was told that it was liable for back pay and that it consequently must stand ready to pay such awards at any moment even though a supplemental hearing and order and further enforcement proceedings were obviously planned and when ultimately there may have been found nothing payable to any claimant.

In support of this startling departure from equitable principles the petitioner quotes from *Daniell*, page 17 of the petition, to the effect that a defendant must not be permitted to defeat the force of an injunction during the time when the plaintiff is attempting to draw in precise language the definitive details of the court's order specifying what the defendant shall or shall not do. The fault with this argument lies, however, in its disregard of the clear sense of the quotation. The passage referred to clearly means that a defendant, *already under a specific and definite injunction*, may not defeat its force when the plaintiff is drawing up the order and having it sealed. In other words, a defendant cannot evade a definitive injunction when all that remains to finalize it is merely a ministerial act.

We have a vastly different situation before us in the present case where the pertinent essence of the decree—its liquidation of back pay claims—was not added to it until some three and one-half years after its issuance. We are directed to nothing in the petition warranting the creation of the kind of frozen standby status the petitioner seeks to impose on the respond-

ents here. Surely a respondent may pay debts due in the interim between a generalized decree of the court and its later definitive order without risking a drastic penalty of contempt. This would seem all the more so when the petitioner sought and was denied by the court below an injunction and other equitable processes calculated to restrain the assignment of assets—a denial which the petitioner left unchallenged. A just application of equitable principles would reject the view the petitioner now takes in seeking to invoke the severe penalty of contempt upon respondents who not only have *not* disobeyed any decree of the court below but who have had every reason to believe that the transactions now questioned were proper and lawful.

Other Respondents Not Guilty of Contempt.

2. The petitioner contends in the alternative, that even if Artware is not guilty of civil contempt the other respondents must be held contumacious because they are (a) the *alter egos* of Artware, or (b) its successors and assigns.

The petitioner complains that the court below did not pass upon its contention "That Weiner and the corporate affiliates, as part of the same enterprise, or as the *alter ego*, successors or agents of Artware, were responsible for the payment of the back pay, and therefore in contempt of the supplemental decree".

The court below, however, did clearly consider the question of possible liability for contempt of affiliates and found that *none* were in contempt of an existing

court decree. The court below said, "* * *, we have the narrow issue of whether the transactions and conveyances of Artware and *its affiliates* (emphasis supplied) were in disobedience or resistance of an existing court order". The court then dismissed all of the requested relief against *all* respondents named in the petition for adjudication in civil contempt, and in the various motions filed by the petitioner. The court therefore did consider and reject the petitioner's contention that liability in contempt should be adjudged as to *all* respondents.

In carefully defining the question before it, the court below pointed out that the issues presented to it by the petitioner arose from characteristic allegations of fraudulent conveyances and unlawful creditor preference. It pointedly observed, however, that the petitioner was seeking to invoke the penalty of contempt and that, consequently, the decisive question of the liability of the respondents in contempt must be whether or not they willfully disobeyed an existing court decree of such specific and definite character as to inform them what they must do. This the court, as we have noted above, found none of the respondents had done because all the acts alleged by the petitioner in support of its contempt petition occurred prior to the December 16, 1955 decree, which for the first time, fixed and liquidated the amounts due to the claimants.

The inconsistency of positions taken by the petitioner is obvious. Artware was the sole respondent named and served until the petitioner sought equitable relief and contempt. Then, for the first time, the

petitioner brought in the other respondents alleging that they were either *alter egos* or "successors and assigns". It appears that the petitioner is willing to take no definite position as to the relationship of the respondents, but hopes that, by affixing a catch-all label to the respondents, other than Artware, to produce the desired result of securing a contempt citation.

This Court's decision in *Regal Knitwear*, 324 U. S. 9, disposes of this contention because nowhere in this long litigation has there been shown a "concrete set of facts" establishing the requisite relationship of these respondents as persons in active concert or participation with Artware to violate the decree of December 16, 1955, within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure.

Decisive of this allegation of liability in contempt as alleged in the petition for contempt, however, either as *alter egos* or "successors and assigns" is the fact that no act of any respondent occurred *after* the entry of the December 16, 1955 decree—the only existing decree which anyone could have disobeyed contumaciously. Consequently, the whole argument of the petitioner on this point must fall in the light of this admitted factual posture of the case.

Petitioner as a Creditor Cannot Invoke Remedy of Contempt.

3. Abundant support for the opinion of the court below is clearly found in this Court's decision in *Nathanson* v. *N. L. R. B.*, 344 U. S. 25. In that case this Court, in considering the Board's attempt to collect back pay claims in a bankruptcy proceeding, held that the Board was a creditor seeking to enforce a claim in contract against the debtor's estate and that such claims were not entitled to priority as a debt due the United States. This Court went on to say, "We cannot * * * give priority to a claim which the United States is collecting for the benefit of a third party". This Court disposed of the contention of the Board in *Nathanson* that the public interest was so great in the elimination of unfair labor practices that the additional sanction of priority should be given in enforcing payment of back pay claims by stating, "Whether that should be done is a legislative decision. The contest now is no longer between employees and management but between various classes of creditors. The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act."

In the opinion below the court held in effect that the allegations of the petition for contempt really disclosed an attempt by the petitioner as agent for back-pay claimants to reach assets of an insolvent

debtor. It pointed to appropriate tribunals and procedures available to the petitioner for the determination of issues involved in such cases. The petitioner has disregarded that instruction. It presses its role as defender of the public interest in eliminating unfair labor practices as warranting its request for contempt. Surely, its position as such here is no stronger than it was in the *Nathanson* case, in which it voluntarily entered a bankruptcy court to accomplish its purposes. What Mr. Justice Douglas said in that case as to the status of the Board as a creditor seeking to enforce claims for the benefit of private parties applies with equal if not greater force to the present situation. The petitioner's complaint that if these respondents are not held in contempt its enforcement duties will be frustrated should carry no more weight than its claim for priority in *Nathanson*. In both situations its status as creditor entitles it to no singular and exceptional remedies, especially the harsh sanction of contempt, when there are available to it those traditional and wholly appropriate procedures by which its allegations may be tried out and determined. What is essentially a simple creditor's suit should not be converted into a menacing federal question merely because the petitioner persists in attaching undue significance to this case and chooses to disregard a plain and proper course pointed out by the court below.

Supplemental Hearing Procedure to Fix Back Pay Wholly Discretionary With Petitioner.

4. It is noteworthy that the practice of leaving to a supplemental hearing the liquidation of back pay claims after a hearing on the merits of an unfair labor practice complaint has established the respondent's liability, lies wholly within the discretion and rule-making power of the petitioner. While the petitioner has used this administrative technique almost consistently and without regard to varying circumstances of fact, it does not follow that in every factual situation the use of the supplemental hearing is either desirable or mandatory. Where, for example, the petitioner has what it considers an unassailable case on the merits, nothing in its rules nor in the interpretative judicial decisions prohibits it from conducting a single hearing in which the combined issues of liability and damages are tried out.

Use of Such Procedure Inequitable on Facts of This Case.

5. It would appear all the more desirable and fair to do so when, as here, a delay of several years foreseeably would intervene between the original hearing on the merits and a supplemental hearing to liquidate back pay claims. It would seem, therefore, strange doctrine that would insist upon utilization of the supplemental hearing technique while at the same time demanding that the respondent freeze all business

operation, which, because of economic circumstances, may have the effect of producing an inability to pay the ultimately determined back pay claims if any were ever established. The inflexible position of the petitioner in regarding the above described technique as the only one should not be implemented by the severity of contempt procedures when, by a more realistic administrative scrutiny of the facts of each case, respondents would not be placed in the position in which they now find themselves.

CONCLUSION.

Petitioner has no reason to feel dissatisfied at the extent of punishment meted out to Deena Artware. Its prospects of an efficient, unified operation on one city block at Paducah were destroyed. The parent company was forced to break up and commit to other subsidiaries parts of its manufacturing business. This procedure which is complained of now was made necessary to avoid greater losses caused by the wrongful acts of those whom the petitioner now represents.

The parent company was not permitted to recover for the current and future losses obviously incident to a less efficient operation. The property formerly owned by Deena Artware and now owned by other subsidiaries is not salable for an adequate price and is not susceptible of other satisfactory use.

Respondent successfully sustained its position before a fair court and jury in the secondary boycott case. It should not receive further punishment on

account of this Pyrrhic victory. The application for certiorari should be denied.

Respectfully submitted,

JAMES G. WHEELER,
c/o WHEELER & MARSHALL,
901-6 Citizens Bank & Trust Building,
Paducah, Kentucky,

MERVIN N. BACHMAN,
c/o ARVEY, HODES & MANTYNBAND,
One La Salle Street,
Chicago, Illinois,
Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
c/o WHEELER & MARSHALL,
901-6 Citizens Bank & Trust Building,
Paducah, Kentucky.

SIDNEY R. ZATZ,
c/o ARVEY, HODES & MANTYNBAND,
One La Salle Street,
Chicago, Illinois,
Of Counsel.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 17 1959
JAMES R. BROWNING, Clerk

No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DEENA ARTWARE, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,

RALPH S. SPRITZER,
Assistant to the Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

THOMAS [redacted] MC DERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement:	
Events prior to the contempt proceedings	4
The contempt proceedings	7
The decision of the court below	12
Summary of argument	14
Argument:	
I. When an employer, between the time of entry of an enforcement decree directing him to make employees whole for loss of wages and the entry of a supplemental decree fixing the specific amounts to be paid, diverts or dissipates its assets for the purpose of frustrating the employees' adjudicated rights, it is guilty of contempt	15
II. The court below erred in refusing to permit proof on the Board's claim that Weiner, Products, and Products' subsidiaries were alter egos, successors, and assigns of Deena Artware and, being solvent, were in contempt of the supplemental decree for their failure and refusal to pay the back pay awards	27
Conclusion	33

CITATIONS

Cases:

Amalgamated Utility Workers v. *Consolidated Edison Co.*, 309 U.S. 261	27
A. M. Andrews Co. v. *National Labor Relations Board*, 236 F. 2d 44	31
Chicago, Milwaukee & St. Paul Ry. Co. v. *Minneapolis Civic and Commerce Assn.*, 247 U.S. 490	32
Clay v. *Waters*, 178 Fed. 385, affirmed, 178 Fed. 396	22
Dickey v. *National Labor Relations Board*, 217 F. 2d 652	31
Fowler v. *Fowler*, 61 Okla. 280, 161 Pac. 227	22

Cases—Continued

	Page
Galland v. Galland, 44 Cal. 475, 13 Am. Rep. 167	22
International Salt Co. v. United States, 332 U.S. 392	21
International Union of Mine, Mill & Smelter Workers v. Eagle-Picher, 325 U.S. 335	19, 20
Kellogg, Ex parte, 64 Cal. 343, 30 Pac. 1030	22
Lamb v. Cramer, 285 U.S. 217	22
Maggio v. Zeitz, 333 U.S. 56	21
Marlin-Rockwell Corp. v. National Labor Relations Board, 133 F. 2d 258	17
McComb v. Jacksonville Paper Co., 336 U.S. 187	25
Merrimack River Savings Bank v. Clay Center, 219 U.S. 527	22
Myers v. Trimble, 3 E.D. Smith (N.Y.) 607	22
Nathanson v. National Labor Relations Board, 344 U.S. 25	16, 19, 20, 24, 26
National Labor Relations Board v. Adel Clay Co., 134 F. 2d 342	31
National Labor Relations Board v. Alaska Steamship Co., 211 F. 2d 357	18
National Labor Relations Board v. Bird Machine Co., 161 F. 2d 589, 174 F. 2d 404	17
National Labor Relations Board v. Blair Quarries, 152 F. 2d 25	31
National Labor Relations Board v. Bradford Dyeing Association, 310 U.S. 318	23
National Labor Relations Board v. Brown & Root, Inc., 203 F. 2d 139	18
National Labor Relations Board v. Calcasieu Paper Co., 203 F. 2d 12	31
National Labor Relations Board v. Cambria Clay Products Co., 215 F. 2d 48	18
National Labor Relations Board v. Carlisle Lumber Co., 94 F. 2d 138	18
National Labor Relations Board v. Concrete Haulers, Inc., 212 F. 2d 477	31
National Labor Relations Board v. Condenser Corp., 128 F. 2d 67	31
National Labor Relations Board v. Draper Corp., 159 F. 2d 294	20
National Labor Relations Board v. Fashion Piece Dye Works, Inc., 100 F. 2d 304	17

Cases Continued

	Page
National Labor Relations Board v. *Fred P. Weissman Co.*, 170 F. 2d 952, certiorari denied, 336 U.S. 972	31
National Labor Relations Board v. *Harbison-Walker Refractories Co.*, 135 F. 2d 837, 137 F. 2d 596	18
National Labor Relations Board v. *Hopwood Retinning Co.*, 104 F. 2d 302	31
National Labor Relations Board v. *Krimm Lumber Co.*, 203 F. 2d 194	31
National Labor Relations Board v. *Local 803, International Brotherhood of Boilermakers*, 218 F. 2d 299	17
National Labor Relations Board v. *Nettleton Co.*, 241 F. 2d 130	31
National Labor Relations Board v. *Newspaper & Mail Deliverers' Union*, 192 F. 2d 654	17
National Labor Relations Board v. *New York Merchandise Co.*, 134 F. 2d 949	16, 17, 20
National Labor Relations Board v. *O'Keefe & Merritt Manufacturing Co.*, 178 F. 2d 445	31
National Labor Relations Board v. *Parran*, 237 F. 2d 373	31
National Labor Relations Board v. *Radio Officers' Union*, 196 F. 2d 960, affirmed, 347 U.S. 17	17
National Labor Relations Board v. *Royal Palm Ice Co.*, 193 F. 2d 569	17
National Labor Relations Board v. *Stilley Plywood Co., Inc.*, 199 F. 2d 319	17
National Labor Relations Board v. *Venetian Blind Workers Union*, 207 F. 2d 124	18
National Labor Relations Board v. *Warren Co.*, 350 U.S. 107	23, 27
National Labor Relations Board v. *Wentworth Bus Lines, Inc.*, 191 F. 2d 849	17
Parker v. *United States*, 126 F. 2d 370, 135 F. 2d 54, certiorari denied, 320 U.S. 737	21
Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U.S. 177	19, 23
Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9	15, 28, 29, 32
Richard v. *Van Meter*, 20 Fed. Cas. 682	22
Southport Petroleum Co. v. *Labor Board*, 315 U.S. 100	31
Staples v. *Staples*, 87 Wis. 592, 58 N.W. 1036-1037	21

Cases—Continued

	Page
State v. *District Court*, 37 Mont. 485, 97 Pac. 841	22
United States v. *Shipp*, 203 U.S. 563	22
Wallace Corp. v. *National Labor Relations Board*, 159 F. 2d 952	17, 19
Walling v. *Reuter Co.*, 321 U.S 671	31
Wartman v. *Wartman*, 29 Fed. Cas. 303, 305	22
West Texas Utilities Co., Inc. v. *National Labor Relations Board*, 195 F. 2d 519, 201 F. 2d 668	18

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*):

Section 10	2
Section 10(c)	2
Section 10(e)	3
18 U.S.C. 401(3)	12

Miscellaneous:

Anno., 120 A.L.R. 703	21
Dangel, *Contempt* (1939), p. 175, § 393	22
2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed., 1871)	22
Rule 65, F.R.C.P.	29

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 46

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DEENA ARTWARE, INCORPORATED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below in the instant contempt proceeding (R. 74), dated December 13, 1958, is reported at 261 F. 2d 503. Earlier relevant opinions of the Court of Appeals are as follows: (1) opinion of July 30, 1952 (R. 1), upholding and directing enforcement of the Board's back pay order, 198 F. 2d 645, certiorari denied, 345 U.S. 906; (2) opinion of November 10, 1953, denying the Board's application for an order of discovery and for an injunction restraining Deena Artware from transferring certain funds to its parent corporation, Deena

Products, Inc., 207 F. 2d 798; (3) opinion of December 16, 1955 (R. 2), upholding and directing enforcement of the Board's supplemental back pay order, 228 F. 2d 871; (4) opinion of January 17, 1958, denying Board's application for an order of discovery, 251 F. 2d 183.

JURISDICTION

The judgment of the court below (R. 73) was entered on December 13, 1958. The petition for a writ of certiorari was granted on May 4, 1959 (359 U.S. 983; R. 92). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*) are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C. title 28, secs. 346 and 347).

QUESTIONS PRESENTED

In a petition to adjudge respondents in civil contempt for refusing to pay certain amounts of back pay due to various employees as a result of their discriminatory discharge by respondent Deena Artware, the

Board alleged (1) that between the date of entry of the Court of Appeals' decree enforcing the Board's original back pay order and the court's entry of a supplemental decree approving the Board's determination of the specific amounts of back pay due, respondents had siphoned off the assets of Deena Artware for the purpose of avoiding payment of any back pay found to be due and owing, and (2) that respondents are integral parts of a single enterprise and, as such, were and are answerable to the court's decrees, which explicitly run against Deena Artware and its officers, agents, successors and assigns.

The questions presented are:

1. Whether the court below properly held that acts calculated to frustrate a decree for back pay cannot serve as a basis for civil contempt proceedings where it appears that such acts were performed in the interval between entry of the original unliquidated back pay decree and entry of the supplemental decree fixing the specific amounts of back pay due.

2. Whether, in any event, the court below erred in dismissing the petition for contempt without determining whether respondents, or any of them, are answerable to the supplementary decree as "officers, agents, successors, and assigns" of Deena Artware.

STATEMENT

Events prior to the contempt proceedings. On October 25, 1949, the Board issued its Decision and Order against Deena Artware. 86 NLRB 732, 9 NLRB 9. The Board found that Deena Artware had violated the National Labor Relations Act by discharging and refusing to reinstate 66 of its employees

who had engaged in a strike. The Board directed "Deena Artware, Incorporated, Paducah, Kentucky, and its officers, agents, successors, and assigns" to offer reinstatement to the discharged employees and to make them whole for any loss of pay suffered by them as a result of the discrimination against them. To this end, the employer was directed to pay each of them a sum equal to the amount which he normally would have earned as wages during the period of displacement, less net earnings received during such period from other employment.

On July 30, 1952, the court below affirmed the Board's decision with respect to 62 of the 66 employees involved and entered a decree enforcing the Board's order (R. 1). This Court denied Deena Artware's petition for a writ of certiorari, 345 U.S. 906.

On or about March 4, 1953, Deena Artware offered reinstatement to all of the strikers. Shortly thereafter, however, Deena Artware closed its various departments. It has never resumed operations and has paid no back pay to any of the employees in question.

On April 9, 1953, the Board applied to the court below for an order restraining Deena Artware from making a partial assignment to Deena Products, Inc. ("Products"), its parent corporation, of the proceeds of a judgment recovered by the former. At the same time, the Board filed application for an order permitting discovery, alleging in support that the affairs of the two corporations were being conducted in such a way as to dissipate the assets of Deena Artware for the purpose of avoiding its back pay obligations (then unliquidated). The court below denied these motions on November 10, 1953, holding that, until the amount

of back pay was liquidated and payment of the fixed sum refused, there was no warrant for action on its part. 207 F. 2d 798. The court added (at p. 802) that if, upon liquidation, "any financial inability on the part of [Deena Artware] to pay the awards is shown to be the result of improper actions on its part in the meantime, appropriate contempt action can then be taken."

Thereafter, the Board held hearings, and on April 21, 1955, issued its Supplemental Decision and Order determining the specific amounts of back pay due to the individual employees involved. The order directed Deena Artware, its officers, agents, successors, and assigns to pay those amounts, which totaled approximately $300,000.00. 112 NLRB 371.

On December 16, 1955, the court below affirmed the Board's supplemental decision and entered its own supplemental decree, which was similarly directed against Deena Artware, its officers, agents, successors and assigns (R. 2).

In 1957, the Board moved the court below for discovery, inspection and depositions, naming Deena Artware, its President (Weiner), Products, and Products' other subsidiaries (Deena of Arlington, Inc., Sippi Products Company, Inc., and Industrial Realty Company, Inc.). The Board alleged that Weiner, who controlled Products and its various subsidiaries (including Deena Artware), had caused the assets of Deena Artware to be siphoned off through the other corporations under his (Weiner's) control for the purpose of evading the back pay obligations. The motion for discovery was made in order to enable the Board to show facts which would warrant a contempt adjudi-

cation requiring payment of the back pay by Deena Artware, its affiliated companies and their officers.

On January 17, 1958, the court below, with Judge (now Mr. Justice) Stewart dissenting, denied the Board's motion. 251 F. 2d 183. The court held (at p. 187) that, in the absence of contempt proceedings, a motion for discovery and inspection was premature and that the "proper procedure would seem to be through contempt proceedings, by which the issue would be raised whether the allegations of the pleading legally constitute contempt."

The contempt proceedings.—On August 20, 1958, the Board petitioned the court below (R. 3) to hold Deena Artware, Weiner, Products and its affiliated corporations in civil contempt. The Board also renewed its motion (R. 34) for discovery, inspection and the taking of depositions.

The petition alleged that Deena Artware, Weiner, and the affiliated corporations had failed and refused to compensate the aggrieved employees. In support of the prayer that respondents be adjudged in contempt and that an order be entered directing respondents to purge themselves of contempt by paying the sum of back pay due to the various employees, the petition alleged as follows:

Deena Artware is, or was, one of several wholly owned subsidiaries of Products, an Illinois corporation engaged in the manufacture and sale of lamps. In recent years, the manufacturing processes have been performed by Products' various subsidiaries (including Deena Artware) and Products has confined itself largely to sales and distribution. Products organized Deena Artware in 1946 as a Kentucky corporation to

acquire a small pottery plant at Paducah for the manufacture of china urns for lamp bases. The organization was started with insufficient capital. Other subsidiaries include Sippi Products Co. ("Sippi"), organized in 1948 to operate a similar plant at Wickcliffe, Kentucky; Deena of Arlington, Inc. ("Arlington"), formed to operate a lamp assembly and shade plant at Arlington, Kentucky; and Industrial Realty Co., Inc. ("Industrial"), a Kentucky corporation organized about November 1954, after Deena Artware allegedly terminated active operations, to hold title to Deena Artware's plant and other physical assets. At all relevant times, Products has owned virtually all the shares of each of the subsidiaries; and George H. Weiner, who owns virtually all the stock of Products, has been president and treasurer of Products and of each of the subsidiaries, and has been a director in each corporation (the other directors having been his wife, son and secretary).

The subsidiaries (except Industrial) manufacture for, and sell to, Products and/or the other subsidiaries exclusively at prices fixed by Products. Products and Weiner have provided the subsidiaries with their raw materials and supplies and have maintained management and overall supervision of the plants and production of the subsidiaries. The parent company has maintained the books and records of the subsidiaries at its Chicago offices, managed and controlled their funds and bank accounts, commingled the funds and property of the subsidiaries with those of Products, and regularly furnished consolidated financial statements to credit agencies and creditors representing that the subsidiaries are integral parts of Products.

About December 1947, Products began construction of a new factory building adjacent to Deena Artware's plant at Paducah, Kentucky, with a view to making possible the completion of the lamp manufacturing process at Paducah. It was intended that the new plant should use the urns produced by Deena Artware and build the finished lamps—a task then being performed by Products in Chicago. Construction was abandoned at Paducah in about July 1948, in favor of a new site at Arlington, Kentucky. Although the abandoned plant had been intended for Products' use, and not Deena Artware's, following May 1948, when the unfair labor practices were committed, Deena Artware was charged with the plant construction costs. But when the abandoned plant's unused construction materials, engineering and architectural plans and services were subsequently used in the construction of the new plant at Arlington, Deena Artware was not credited with their value.

About March of 1949, following the hearings in the unfair labor practice proceeding; Products and Weiner caused Deena Artware to lower its price—despite an increase in costs—on the urns which it manufactured and sold exclusively to Products. As a consequence, Deena Artware showed losses for its operations and Products made substantial profits on the sale of the completed product.

On October 31, 1949, six days before the issuance of the Board's Decision and Order in the unfair labor practice proceeding, Products and Weiner caused Deena Artware, in order to guarantee the latter's alleged indebtedness to Products, to execute a promissory note to Products for $75,459.65, payable within five

years, with interest at 6 percent payable semi-annually. This note was secured by mortgages on Deena Artware's real and personal property. On or about September 19, 1952, Deena Artware executed further mortgages, allegedly to secure another promissory note payable to Products.

On December 16, 1952, following entry of the enforcement decree by the court below, Products and Weiner caused Deena Artware to make a partial assignment to Products of the proceeds of a judgment recovered by Deena Artware (a judgment against the union involved in the unfair labor practice proceedings before the Board). On or about January 22, 1954, Products received $19,320.97 under this assignment.

In April 1953, Products and Weiner caused Deena Artware to cease all operations. Thereafter, Products received from Sippi the supplies it had customarily received from Deena Artware. Until November 1954, Sippi and Products, without payment, used Deena Artware's plant premises, facilities and properties at Paducah.

On November 24, 1954, upon maturity of the promissory note of October 31, 1949, and apparently in lieu of foreclosure proceedings, Products and Weiner, with knowledge of the proceedings before the Board to determine the exact amounts of back pay due, caused Deena Artware to convey all of its real and personal property to Products in cancellation of its then alleged indebtedness of $105,000, leaving as Deena Artware's sole unsatisfied obligation the back pay due under the decrees herein. Deena Artware has engaged in no business activities since this transfer.

Thereafter, in May 1955, Products and Weiner conveyed the former Deena Artware plant and equipment

to a newly organized subsidiary, Industrial Realty Co., Inc., which continues to hold the legal title to the properties. Products and Weiner then caused Industrial to lease the plant and equipment to Sippi, which has occupied and operated it as a branch of its principal plant at Wickcliffe. The former manager for Deena Artware has since managed the Arlington plant and has had general supervision over the two Sippi plants. The same equipment, production, and manufacturing and distribution arrangements exist at the new Sippi branch plant as existed when the plant was operated by Deena Artware.

The theory of the petition was (1) that, during the period between the entry of the court's decree enforcing the Board's initial back pay order (July 30, 1952) and the court's supplemental decree enforcing the Board's supplemental order (December 16, 1955), Weiner, Products and the affiliates had caused the affairs and business of Deena Artware to be conducted in a manner which divested Deena Artware of its assets, for the purpose of preventing and frustrating compliance with the decrees of the court below; and (2) that Weiner, Products and the various subsidiaries (including Deena Artware) were integral parts of a single enterprise, and the insolvency of Deena Artware could not relieve the other respondents of their obligations, as officers, agents, successors or assigns, to comply with the back pay decrees.

Deena Artware moved that the petition be dismissed, asserting that there was no claim which would warrant the requested relief (R. 15). It also filed an answer admitting certain of the allegations, denying the allegations of fraud or wrongdoing on its part, and affirma-

tively alleging that the transactions complained of were bona fide business transactions, and that the notes, mortgages, assignment and conveyance were duly, regularly and properly executed, for adequate and proper consideration and for value given (R. 15-30). Weiner and the other affiliated corporations moved that the petition be dismissed for want of jurisdiction (R. 31-34). Alternatively, they adopted as their own the allegations of the answer filed by Deena Artware (*ibid.*).

The decision of the court below.—The court below granted the motions of Deena Artware, Weiner and the affiliated corporations to dismiss the contempt petition for failure to state a cause of action, and denied the motion of the Board for discovery, inspection and the taking of depositions (R. 73). It reasoned that, under 18 U.S.C. 401(3), the refusal to comply with a back pay award, when one is financially able to do so, is contempt of court, but that at least since December 16, 1955, the date of the supplemental decree, Deena Artware had been financially unable to pay the awards, so that its failure to pay at any time after this date could not furnish a basis for contempt proceedings.

Insofar as the petition alleged that Deena Artware, Weiner, Products and the affiliates had taken steps, between the dates of the two decrees, in furtherance of a scheme to divest Deena Artware of its assets for the purpose of frustrating and preventing compliance, the "decisive question" for the court was "the effective date for the purpose of contempt proceedings of the order or decree of this Court which it is alleged the

respondents have disobeyed." On this point the court below held (R. 82, 84):

> Acts of a respondent *prior* to the entry of the order or judgment which he is charged with disobeying, do not constitute contempt of court, regardless of the intentions of the respondent to avoid the impact of an order, or judgment expected by him to be thereafter entered.
>
> * * * * *
>
> * * * We are of the opinion that the enforcement order of July 30, 1952, which left undecided and undisposed of the amounts of back pay which any individual employee would be entitled to receive, was not sufficiently definite and mandatory to serve as the basis for contempt proceedings, and that the order which must serve as the basis for such proceedings is the supplemental decree of December 16, 1955.

Since the transactions alleged to have resulted in the dissipation of Deena Artware's assets occurred prior to December 16, 1955, there was, in the opinion of the court below, no basis for treating them as contumacious.

The Court of Appeals did not discuss the allegations by the Board that Weiner and the corporate affiliates, as part of the same enterprise, or as the alter egos, successors or agents of Deena Artware, were responsible for payment of the back pay, and therefore in contempt of the supplemental decree.

SUMMARY OF ARGUMENT

I

When an employer and others identified with it engage in a course of conduct designed to defeat payment of back pay under a Board order, such purposeful conduct taking place in the interval between the entry of a decree enforcing the order in general terms and the entry of a supplemental decree fixing the specific amounts due, they are chargeable with contempt. An enforcement decree which directs a respondent to make employees whole for loss of wages attributable to illegal discrimination against them is analogous to an ordinary interlocutory judgment fixing liability but leaving for future determination questions as to the precise amount of the money obligation. Such a decree or judgment, although it contemplates further action for the purpose of computing the specific amounts due, is final and conclusive insofar as it determines the obligor's liability to compensate the injured parties.

The effect of the enforcement decree entered in this case was to impose a fixed and immediate obligation upon the employer to stand ready to discharge its liability and make payment of whatever specific sums were ultimately found due. This meant, at a minimum, that the employer had the duty, during the pendency of the supplemental proceedings, to refrain from acts calculated to defeat the employees' adjudicated rights. To hold otherwise would be to treat the case as if an enforcement decree had never been entered and to sanction a technique of evasion which could sap the back pay remedy of its effectiveness.

II

The court below also erred in refusing to permit proof of the Board's claim that Weiner, Products, and Products' subsidiaries are alter egos, successors, and assigns of Deena Artware and, being solvent, are in contempt of the supplemental decree for their failure and refusal to pay the back pay awards. The Board's allegations—which, for present purposes, must be taken as true—establish that these respondents, together with Deena Artware, constitute a single integrated enterprise commonly owned and controlled; that Deena Artware's business and assets remain within the family of interrelated corporations; and that the diversion of business and transfer of assets which have taken place had the object of frustrating the judgment. In such circumstances, the controlling principle is that stated by this Court in *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9, 14: "* * * Labor Board orders are binding upon successors and assigns who operate as 'merely a disguised continuance of the old employer.'"

ARGUMENT

I

When an Employer, Between the Time of Entry of an Enforcement Decree Directing It to Make Employees Whole for Loss of Wages and the Entry of a Supplemental Decree Fixing the Specific Amounts to Be Paid, Diverts or Dissipates Its Assets for the Purpose of Frustrating the Employees' Adjudicated Rights, It Is Guilty of Contempt

Congress has empowered the Board, if it finds that an employee has been discriminatorily discharged, to direct the offending employer "to take such affirma-

tive action including reinstatement of employees with or without back pay, as will effectuate" the policies of the Act. Section 10(c), *supra*, p. 2. A direction to make employees whole, entered at the conclusion of an unfair labor practice hearing, rarely specifies the amount of back pay due the injured employees. Indeed, the Board does not normally take any evidence, in the course of the unfair labor practice hearing, concerning the amount of back pay due, if any. Its practice is to defer that computation until after the order in its unfair labor practice proceeding has issued. Accordingly, the Board's initial order, when it has found that an employee has been discriminated against, characteristically directs the offending party to make the employee whole for any loss of pay suffered by reason of the discrimination against him by the payment of a sum of money equal to the amount which he would have earned as wages during the operative period of the discrimination, less his net earnings from other employment during such period.

If the party to whom such an initial order is directed fails to comply with it, the Board seeks enforcement in the appropriate court of appeals. If the court approves the Board's order, it enters its own decree

[1] The Board's practice in this respect, which was noted in *Nathanson v. National Labor Relations Board*, 344 U.S. 25, 29, avoids injecting the collateral and premature issue of back pay into the unfair labor practice hearing. Obviously, when that hearing takes place there is no assurance that either the Board or a reviewing court will conclude that an unfair labor practice has been committed. *See National Labor Relations Board v. Mexia Textile Mills, Inc.*, 339 U.S. 563, 569; *Merchandise Co.*, 134 F. 2d 949, 951 (C.A. 2). Furthermore, a hearing on the back pay issue often proves unnecessary since a large number of cases are settled through informal negotiations after the Board's order issues or is enforced by a court of appeals.

(invariably, in the general language of the Board's order) directing the employer to make whole the employee or employees for wage losses sustained as a consequence of the discrimination. If, thereafter, the Board and the employer are unable to agree upon the amounts of back pay due, the Board conducts a formal hearing on that supplementary issue. After taking evidence, it makes its computation and issues its supplemental order fixing the amount due and directing its payment.[1] In the event of non-compliance, the Board's remedy, once again, is to seek enforcement through the court of appeals; in such instance, through entry of a supplementary court decree enforcing the Board's order and directing the payment of the specific amounts of back pay found to be due.[2]

Such was the procedure followed in the instant case. The court below entered its decision enforcing the

[illegible]

Board's initial back pay order on June 30, 1952. When respondent Deena Artware and representatives of the Board were unable to reach agreement with respect to the amounts due to the 62 employees involved, the Board ordered a formal hearing, which was held in 1954. The Board, in April 1955, issued its supplemental decision and order determining and directing the payment of the specific amounts of back pay found to be due to the individual employees, and in December of that year the court below entered its supplemental decree enforcing that order.

As set forth in the Board's contempt petition, the dispute in this case arises from the fact that, between the dates of entry of the Court of Appeals' enforcement decree and its later supplemental decree, respondents, in order to frustrate payment of back pay awards, caused Deena Artware to transfer its funds, its plant, its equipment and its business to affiliated corporations (which are also respondents here). The issue thus posed is whether an enforcement decree which directs the payment of back pay, but does not fix the specific amounts due, imposes a binding obligation to refrain from acts which would frustrate satisfaction of the employees' adjudicated rights. In concluding that the original enforcement decree creates

F. 2d 667, 668 (C.A. 5); *West Texas Utilities Co., Inc. v. National Labor Relations Board*, 195 F. 2d 519, 201 F. 2d 668 (C.A. 5); *National Labor Relations Board v. Cambria Clay Products Co.*, 215 F. 2d 48, 56 (C.A. 6); *National Labor Relations Board v. Hudson-Walker Refractories Co.*, 135 F. 2d 837, 137 F. 2d 390, 397 (C.A. 8); *National Labor Relations Board v. Bruce A. Rice, Inc.*, 203 F. 2d 139, 147 (C.A. 8); *National Labor Relations Board v. Cudahy Packing Co.*, 94 F. 2d 138, 146-147 (C.A. 9); *National Labor Relations Board v. Overseas Rivet Workers' Union*, 207 F. 2d 424, 426-427 (C.A. 9); *National Labor Relations Board v. Matson Steamship Co.*, 211 F. 2d 357, 360-361 (C.A. 9).

no effective obligation and that there can be no contempt until the amounts to be paid are liquidated, the court below, we believe, has misconceived the legal effect of the enforcement decree and has overlooked the distinction between mere non-payment of an unliquidated obligation and fraudulent conduct designed to avoid ultimate payment.

"A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson* v. *National Labor Relations Board*, 344 U.S. 25, 27; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. An enforcement decree which directs, in terms of the Board's generalized formula, that back wages be paid to employees who have suffered discrimination is "analogous to interlocutory judgments of courts fixing liability but leaving for future determination questions as to amount of liability * * *." *Wallace Corp.* v. *National Labor Relations Board*, 159 F. 2d 952, 954 (C.A. 4). Such a decree, although it contemplates the need of making computations, is final and conclusive insofar as it determines the employer's liability to make compensation. As this Court has stated of a decree indistinguishable from the enforcement decree involved here, "the order was definite and complete; it contemplated only arithmetical computation." *International Union of Mine, Mill & Smelter Workers* v. *Eagle-Picher*, 325 U.S. 335, 341. Similarly, as the Court noted in holding that such a decree entitled the Board to file a claim in bankruptcy, the "order is a command to pay an amount owed the Board as agent for the injured employees. * * * The Board

has eliminated the discrimination by the back pay order; and enforcement of its order has been directed by the Court of Appeals. The full sanction of the National Labor Relations Act has therefore been placed behind the order." *Nathanson, supra*, 344 U.S. at 27-28.

This "command", which has behind it the "full sanction" of the Act, surely imposes upon the employer a fixed and immediate obligation to stand ready to discharge his liability and make payment of whatever specific sums may ultimately be found due.

At a minimum, there is a duty, during the pendency of the supplemental proceedings, to refrain from acts which would undermine the decree already entered. To attribute less than that to the decree would be to treat the case "as if an enforcement decree had never been entered." *Eagle-Picher, supra*, 325 U.S. at 340. It would be an empty rite to order restitution by formal administrative order and court decree if it nonetheless remained open to the party charged with liability to take steps designed to prevent satisfaction.

To be sure, the enforcement decree does not direct the payment of any specific sum. But the fact that the amounts to be paid have not become finally fixed cannot be taken to mean that in the meantime a respondent can purposefully and permanently disable itself from carrying out the command of the enforcement decree. Obviously, until the amounts to be paid become liquidated there can be no adjudication in contempt for mere non-payment.[3] But that is not this

[3] *National Labor Relations Board* v. *Draper Corp.*, 159 F. 2d 294, 298 (C.A. 1); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (C.A. 2).

case. Here (assuming, as one must, that the allegations of the petition are true), the offense lies in the "studied course of conduct", following entry of the decree which finally determined the obligation to make restitution, designed to deprive the employees "irretrievably of the fruits of the decrees". *Parker* v. *United States*, 126 F. 2d 370, 378-379, 135 F. 2d 54, 58 (C.A. 1), certiorari denied, 320 U.S. 737. If such conduct is beyond the reach of the contempt powers of the court of appeals, it would seem that when the Board obtained enforcement of its original back pay order it "won a lawsuit and lost a cause" (*International Salt Co.* v. *United States*, 332 U.S. 392, 401).

Inability to pay may, in appropriate circumstances, excuse non-compliance with a court order. *Maggio* v. *Zeitz*, 333 U.S. 56, 69. Our view of the enforcement decree does not mean, as respondents assert (Br. in Op. 16-17), that the employer must freeze assets in order to be able to meet his obligation and that he is precluded from taking ordinary business risks which might affect ability to pay. Our point is simple: that inability to comply with a decree when one has purposefully caused the inability (as alleged to be the case here) in order to evade the duty of compliance cannot be a defense. When "the inability [to pay] is wilfully brought about by [the] defendant himself, with intent to avoid payment, the refusal to pay becomes contumacious, and the inability so resulting will not purge the defendant of contempt." *Staples* v. *Staples*, 87 Wis. 592, 596, 58 N.W. 1036-1037. See cases collected in Anno., 120 A.L.R. 703. For it is a matter of "common sense and common justice that, where the contemnor creates the inability * * * he rather aggra-

vates than extenuates his offense." *Clay* v. *Waters*, 178 Fed. 396, 399 (W.D. Mo.), affirmed, 178 Fed. 385 (C.A. 8).

Indeed, the principle has been applied in situations where no order whatever had been entered. Thus, it has been held that the diversion or destruction of property or funds for the purpose of defeating a decree or judgment which a court may ultimately make concerning the ownership and disposition of such property or funds constitutes contempt. The reason is, of course, that "a final decree would be idle and nugatory if pending the litigation [the party in question] should be held at liberty to put the fund beyond the reach of the process of the court." *Merrimack River Savings Bank* v. *Clay Center*, 219 U.S. 527, 536. And see *Lamb* v. *Cramer*, 285 U.S. 217, 219-220.[1]

What is true of contempt proceedings in cases in which no judgment or decree has yet been entered certainly applies with greater force to a remedial civil contempt proceeding predicated upon a decree which determines liability and prescribes relief. As the court below itself pointed out (R. 83), Deena Artware "knew, that it would be later ordered by the Court to make certain specific payments * * *."

The serious consequences which flow from the ruling

[1] See, also, 2 Daniell, *Chancery Pleading and Practice*, pp. 1684-1685 (4th Amer. Ed. 1871); *Clay* v. *Waters*, 178 Fed. at 388, 398-399; *Wartman* v. *Wartman*, 29 Fed. Cas. 303, 305 (No. 17,210); *United States* v. *Shipp*, 203 U.S. 563, 575; *Richard* v. *Von Mohr*, 20 Fed. Cas. 682 (No. 11,763); *Ex parte Kellogg*, 64 Cal. 343, 344, 30 Pac. 1030, 1031; *Gallard* v. *Gallard*, 11 Cal. 475, 478, 13 Am. Rep. 167; *State* v. *District Court*, 37 Mont. 185, 188, 97 Pac. 811, 812; *Mace* v. *Trimble*, 3 E. D. Smith (N.Y.) 607; *Fowler* v. *Fowler*, 6 Okla. 280, 284-286, 161 Pac. 227, 230-231; Daniell, *Chancery* (1939), p. 175, § 393.

of the court below serve to refute it. As this Court has noted, the remedy of back pay is one of the most important sanctions for effectuating the policies of the Act. *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197. The effectuation of these policies is as much the business of a reviewing court as of the Board. *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U.S. 318, 342-343; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112. A court decree, like the Board order it enforces, is aimed at the prevention of unfair labor practices, and to the extent that compliance is frustrated, that objective is thwarted. "It is for this reason that Congress gave the judicial remedy of contempt as the ultimate sanction to secure compliance with Board orders." *Warren Co.*, *supra*, 350 U.S. at 112-113.

The refusal of the court below to apply contempt sanctions against respondents threatens the scheme of enforcement. As noted above, once an enforcement decree is entered directing the offending party to make the injured employees whole for loss of pay, there remains the task of computing the exact amounts due to the employee or employees, after appropriate set-off of amounts which were or might have been earned in other employment. This arithmetical computation often entails the resolution of numerous subsidiary issues. "The computation of the amount due may not be a simple matter. It may require, in addition to the projection of earnings which the employee would have enjoyed had he not been discharged and the computation of actual interim earnings, the determination whether the employee wilfully incurred losses, whether

the back pay period should be terminated because of offers of reinstatement or the withdrawal of the employee from the labor market, whether the employee received equivalent employment, and the like." *Nathanson, supra*, 344 U.S. at 29-30. The result is that frequently the determination of the specific amount of back pay due is a laborious and time-consuming task. There are bound to be substantial time lags (as there were here) between the entry of the enforcement decree, the computation of the specific amounts of back pay due, and the entry of a supplemental decree directing the payment of such sums.

If, as the court below has held, the enforcement decree imposes no enforceable duty, the offending party is free to take advantage of the unavoidable delay between the enforcement and supplemental decrees and to defeat the Board's back pay order by diverting its assets.[*] It is difficult to believe that such conduct—calculated as it is to frustrate what is perhaps the most potent remedy by which the Board can achieve the statutory objectives—is immune from contempt sanctions. Indeed, the court below itself, at an earlier stage of this litigation, acknowledged that such "improper actions" would constitute contempt. 207 F. 2d 798, 802.

It is no answer to suggest, as the opinion does (R. 82), that the "transactions complained of in the present case could have been attacked and possibly upset" under state procedures dealing with preferences or

[*] The seriousness of the ruling is aggravated by the fact that the court below is also of the view that the Board would not be entitled to an order restraining the dissipation of assets pending determination of the specific amounts of back pay due. 207 F. 2d 798, 801-802.

conveyances for the purpose of defrauding creditors." As Judge (now Mr. Justice) Stewart observed in this case in dissenting from an earlier ruling of the Court of Appeals denying the Board's application for an order of discovery, 251 F. 2d 183, 187-188:

> Even if the Board could properly now institute a trial court proceeding, the object of such a proceeding could only be the effectuation of the enforcement decree of this court. The effectuation of that decree is the proper business of this court alone. Whether or not the Board is called a judgment creditor of the respondent, any action taken in a trial court would stem solely from the enforcement decree of this court, whose function it is to retain jurisdiction to administer all necessary further relief * * *.

This Court, we submit, has made plain that the possibility of alternate procedures cannot serve to relieve the reviewing court of its responsibility to compel obedience to its decrees. Thus, it declared in *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 194-195, a case arising under the Fair Labor Standards Act:

> The direction of the court was that respondents make payments of wages to their employees pursuant to a prescribed formula. If the court is powerless to require the prescribed payments to be made, it has lost the most effective sanction for its decree and a premium has been placed on violations. The fact that another suit might be brought to collect the payments is, of course, immaterial. For the court need not sit supinely by waiting for some litigant to take the initiative. Vindication of its authority through enforcement

> of its decree does not depend on such whimsical or fortuitous circumstances. The fact that the Administrator is the complainant and that the back wages go to the employees is not material. It is the power of the court with which we are dealing—the power of the court to enforce compliance with the injunction which the Act authorizes, which the court has issued, and which respondents have long disobeyed.

Respondents, relying on this Court's decision in *Nathanson, supra*, intimate that the remedy of contempt is not available to the Board to compel payment of back pay awards ordered by a court decree because the Board merely acts "as agent for back-pay claimants" (Br. in Op. 14). In truth, *Nathanson* runs counter to the contention which respondents advance. In that case, the Court held that a back pay award was not entitled to priority in bankruptcy proceedings as a debt due to the United States, reasoning that the Board, in collecting the claims, acts as "agent for the injured employees." The Court nonetheless made it clear, in that very case, that a back pay order serves to vindicate the public policy of the statute; that the Board is the only party entitled to enforce the Act; and that, when enforcement of a Board order has been directed by a court of appeals, the "full sanction" of the Act "has therefore been placed behind the order." *Nathanson*, 344 U.S. at 27, 28.

The sanctions of the Act, as this Court has repeatedly held, include the sanction of contempt. The provision "conferring exclusive power upon the Board to prevent any unfair labor practice . . . necessarily em-

braces exclusive authority to institute proceedings for violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. * * * If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 269-270. And see *National Labor Relations Board* v. *Warren Co.*, *supra*, 350 U.S. at 112-113.

II

The Court Below Erred in Refusing to Permit Proof on the Board's Claim That Weiner, Products, and Products' Subsidiaries Were Alter Egos, Successors, and Assigns of Deena Artware and, Being Solvent, Were in Contempt of the Supplemental Decree for Their Failure and Refusal to Pay the Back Pay Awards

The alternate theory of the Board's petition was that, even if respondents are not answerable in contempt for their alleged misconduct during the period between entry of the enforcement and supplemental decrees, all respondents except Deena Artware (which was already insolvent at the time of the entry of the second decree) are nonetheless answerable for nonpayment of the sums directed to be paid by the supplemental decree. The theory was grounded, briefly, on allegations that Deena Artware and the other respondents were joined in a single enterprise; that the latter, as alter egos, successors, or agents of Deena Artware, were chargeable with the payment of the back pay

awards prescribed by the supplemental decree; and that, being solvent, they were guilty of contempt in failing and refusing to pay them. The court below does not appear to have specifically addressed itself to this branch of the Board's case. Possibly, it may have concluded, in line with its general ruling, that since the facts alleged to establish this relationship among the respondents antedated the supplemental decree, they were not cognizable for the purpose of establishing violation of that decree (R. 84). In any event, we submit that the court erred in refusing to allow proof on this theory of the case.

As pointed out above, the relevant back pay orders and decrees were made binding not only upon Deena Artware, but also upon its "officers, agents, successors, and assigns." This Court has dealt on several occasions with the scope and reach of such orders, both under the Act and under other comparable statutes. It summed up its views in *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 14-15:

> The term "successors and assigns" in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure. Successors and assigns may, however, be instrumentalities through which defendant seeks to evade an order or may come within the description of persons in active concert or participation with them in the violation of an injunction. If they are, by that fact they are brought within scope of contempt proceedings by the rules of civil procedure. We have indicated that Labor Board orders are binding upon such

cessors and assigns who operate as "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *Labor Board*, 315 U.S. at 106. We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforcible by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons." *Walling* v. *Reuter Co.*, 321 U.S. 671, 674. In both of these cases the reference is not merely to succession, but to a relation between the defendant and the successor which might of itself establish liability within the terms of Rule 65 [of the Rules of Civil Procedure].[6]

The relevant inquiry here is whether, on the allegations of the petition, the relationship between Deena Artware and the other respondents is such as to make the latter liable for the payment of the back pay awards. The answer, as this Court has indicated, depends "on an appraisal of [the] relations and behavior" of the parties in the particular case. *Regal*

[6] Rule 65(d) provides: "Every order granting an injunction and every restraining order * * * is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Knitwear, supra, 324 U.S. at 15.[7] We turn therefore to the concrete situation presented here.

In the present posture of the case the Board's allegations must, of course, be taken as true. From those allegations there emerges the following pattern:

(1) Weiner is the real owner of Products and its affiliated subsidiaries, including Deena Artware, and he has directed and controlled their financial and business operations.

(2) Products and its affiliated subsidiaries, including Deena Artware, constitute and have been operated financially and otherwise as a single integrated enterprise engaged in the same business, with each corporation performing a particular function as a department or division of the enterprise.

(3) Weiner and Products caused Deena Artware to cease all operations and transfer its plant, equipment and business to Products and its other subsidiaries, which are now continuing that business without substantial change.

(4) Weiner, Products, and the affiliated subsidiaries have engaged in a systematic and progressive diversion of Deena Artware's funds and assets, throughout the course of the litigation with the Board, for the purpose of defeating any back pay awards.

---

[7] Obviously, one may appraise the relationships existing at the time that a decree is entered (as well as thereafter) in order to determine the identity of persons within its reach. The question "Who is subject to the decree?", is discrete from the question "What are the acts of contempt?". Respondents' arguments (see Br. in Op. 12), resting on the proposition that the alleged relationships between them antedated the supplemental decree—a proposition with which we can readily agree—confuse the two questions

In short, we have here an integrated enterprise, with common ownership and common control of its component units; affiliates who have taken over Deena Artware's business and assets and are no more than a "disguised continuance of the old employer" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 106); and a diversion and transfer of assets from Deena Artware to the others for the purpose of "evading the judgment" (*Walling* v. *Reuter Co.*, 321 U.S. 671). The case thus presents, in our view, "appropriate circumstances" in which the obligation to compensate the employees for loss of wages may be enforced against respondents Weiner, Products and its subsidiaries. For the relationship of these respondents to Deena Artware compels the conclusion either that they, together with Deena Artware, constitute a single employer,[2] or that they have been "in active concert or participation" with Deena Artware in pursuing a plan of evasion.[3]

[2] Cf. *National Labor Relations Board* v. *Nettleton Co.*, 241 F. 2d 130, 131 (C.A. 2); *A. M. Andrews Co.* v. *National Labor Relations Board*, 236 F. 2d 41, 45 (C.A. 9); *National Labor Relations Board* v. *Concrete Haulers, Inc.*, 212 F. 2d 477, 478-479 (C.A. 5); *National Labor Relations Board* v. *Calcasieu Paper Co.*, 203 F. 2d 12, 13 (C.A. 5); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 70-72 (C.A. 3).

[3] Cf. *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 F. 2d 302, 304 (C.A. 2); *National Labor Relations Board* v. *Pagan*, 237 F. 2d 373, 375 (C.A. 4); *Dickey* v. *National Labor Relations Board*, 217 F. 2d 652, 653 (C.A. 6); *National Labor Relations Board* v. *Keiman Lumber Co.*, 203 F. 2d 194, 196 (C.A. 2); *National Labor Relations Board* v. *O'Keefe & Merritt Manufacturing Co.*, 178 F. 2d 445, 448-449 (C.A. 9); *National Labor Relations Board* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 953-954 (C.A. 6), certiorari denied, 336 U.S. 972; *National Labor Relations Board* v. *Blair Quarries*, 152 F. 2d 25, 26 (C.A. 4); *National Labor Relations Board* v. *Adel Clay Co.*, 134 F. 2d 342, 346 (C.A. 8).

A different result is not indicated merely because the various component units of the integrated enterprise were organized as separate corporate entities. For where, as here, a subsidiary has been controlled and "used as a mere agency or instrumentality of the owning company," the courts will "not permit themselves to be blinded or deceived by mere forms * * * but, regardless of fictions will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require." *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Minneapolis Civic and Commerce Assn.*, 247 U.S. 490, 501. Nor does it make any difference, as respondents intimate (Br. in Op. 12), that only Deena Artware was party to the original unfair labor practice proceedings and that the relevant orders and decrees run specifically against Deena Artware but do not refer to the other respondents by name.[10] For, as the Court observed in *Regal*, *supra*, 324 U.S. at 14, those identified with the party defendant, whether as alter egos or successors or assigns, are bound "although they were not parties to the original proceeding."

---

[10] As earlier noted, all of the relevant orders and decrees do run to the "officers, agents, successors and assigns" of Deena Artware.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

STUART ROTHMAN,
General Counsel,

THOMAS J. MCDERMOTT,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

AUGUST 1959.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

SEP 1 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1958.

No. [redacted] 46

NATIONAL LABOR RELATIONS BOARD, Petitioner,

versus

DEENA ARTWARE, INCORPORATED, ET AL., Respondent.

BRIEF FOR RESPONDENT.

JAMES G. WHEELER,
of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

MERVIN N. BACHMAN,
of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois,
Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

SIDNEY R. ZATZ,
of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois,
Of Counsel.

WESTERFIELD BONTE CO. INCORPORATED LOUISVILLE KY.

INDEX.

PAGE

Questions Presented 1

Statement 2

Deena Products v. United Brick & Clay Workers, et al., 195 F. 2d 612 4

United Brick & Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 11

N. L. R. B. v. Deena Artware, Inc., 207 F. 2d 798 8

N. L. R. B. v. Deena Artware, Inc., 228 F. 2d 871 11

N. L. R. B. v. Deena Artware, Inc., 251 F. 2d 183 11

N. L. R. B. v. Deena Artware, Inc., 261 F. 2d 503 12

Summary of Argument 13

Argument:

I.

(a) No Respondent Is in Contempt of the July 30, 1952 Decree Because It Did Not Fix Any Definite Amount To Be Paid.

(b) No Respondent Is in Contempt of the December 16, 1955 Decree, Even if Artware's Insolvency Resulted From Alleged Preferential Transfers of Its Assets to Other Respondents Because the Transfers Occurred *Prior* to that Decree 14

II.

The Allegations Concerning the Relationship of the Other Respondents to Artware (the Only Party to the Proceeding) Do Not Meet the Test of Legal Sufficiency Within the Meaning of Rule 65(d) of the Federal Rules of Civil Procedure as to Warrant Liability in Contempt 19

Conclusion 26

AUTHORITIES.

PAGE

Berry v. Midtown Service Corp., 2 Cir., 104 F. 2d 107 122 A. L. R. 1341, 308 U. S. 629 ..... 15, 16

Deena Products Co. v. United Brick & Clay Workers, et al., 195 F. 2d 612, Certiorari denied, 344 U. S. 822, 73 S. Ct. 21 ..... 4, 5

Finley v. Union Joint Stock Land Bank, 281 Mich. 214, 274 N. W. 768 22

Gledhill v. Fisher & Co., 272 Mich. 353, 262 N. W. 371, 102 A. L. R. 1042 22

Hamilton Nat'l Bank v. Halsted, 31 N. E. 900, 134 N. Y. 520 20

Kingston Dry Dock Co. v. Lake Champlain Transp. Co., 2 Cir., 31 F. 2d 265 ..... 20, 22

McComb v. Jacksonville Paper Co., 336 U. S. 187 18

McFarland v. U. S., 7 Cir., 295 F. 648 14

Nathanson v. N. L. R. B., 344 U. S. 25 17

N. L. R. B. v. Bell Oil & Gas Co., 5 Cir., 99 F. 2d 56 14

N. L. R. B. v. Blackstone Mfg. Co., 123 F. 2d 633 ..... 23, 24

N. L. R. B. v. Deena Artware, Inc., 207 F. 2d 798 ..... 8, 10

N. L. R. B. v. Deena Artware, Inc., 251 F. 2d 183 11

N. L. R. B. v. Deena Artware, Inc., 228 F. 2d 871 11

N. L. R. B. v. Deena Artware, Inc., 261 F. 2d 503 12

N. L. R. B. v. N. Y. Merchandise Co., 134 F. 2d 949 14

N. L. R. B. v. Timkin Silent Automatic Co., 114 F. 2d 449 21

N. L. R. B. v. Warren Co., 350 U. S. 107 18

In re Olsen, 2 Cir., 70 F. 2d 253 14

Regal Knitwear Co. v. N. L. R. B., 324 U. S. 9 ..... 23, 24

United Brick & Clay Workers v. Deena Artware, Inc., 198 F. 2d 637 ..... 5, 6

IN THE

Supreme Court of the United States

October Term, 1958.

No. 790

NATIONAL LABOR RELATIONS BOARD, - *Petitioner,*

v.

DELNA ARTWARE, INCORPORATED, ET AL., *Respondent.*

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED.

1. Whether any respondent can be deemed in contempt of the decree of July 30, 1952, since that decree did not fix any amounts due the back pay claimants.

2. Whether any respondent can be deemed in contempt of the December 16, 1955 decree which fixed the sums due, where Artware became insolvent *prior* to that decree, and it is alleged that its insolvency was caused by other respondents diverting Artware's assets to themselves *prior* to the decree to avoid payment of the ultimately liquidated claims.

3. Whether the respondents (other than Artware), who were not parties to the proceedings when the respective decrees were entered, may be subject to contempt for failure to pay the amount assessed against Artware.

4. Whether the Board's allegations that respondents are alter egos, successors and assigns of Artware are sufficient, within the requirements of Rule 65(d) of the Federal Rules of Civil Procedure, to establish liability of any respondents in contempt of either decree.

STATEMENT.

Deena Artware was organized as a Kentucky corporation in January, 1946. Its capital stock, consisting of 800 shares, had no par value. It was recited in the Articles that the stock was owned as follows: Marliss Manufacturing Company, an Illinois corporation, 391 shares; George H. Weiner, 3 shares; Dorothy Weiner, 3 shares; Edward Brill, 3 shares. The incorporators were Melvin A. Garretson, Irvin Coppel and Jean Levich.

The corporation acquired a small pottery plant in Paducah, Kentucky, the operation of which had not been successful prior to that time. It paid for this plant $65,000.00. Weiner never owned more than three shares of its stock. Deena Products Company acquired and still holds a majority of the shares issued and outstanding. The pottery plant was located on a lot at Third and Ohio Streets in Paducah, Kentucky, fronting 115 feet, 6 inches on Third Street. In the rear of this building and separated from it by an alley and the tracks of a railroad, was a lot owned by the corporation, approximately 300′ x 123′.

Deena Artware entered into a contract for the construction at a cost of approximately $83,000.00 of a

plant or addition to its plant on the vacant property above referred to. Its purpose was to equip the new plant so that the lamp bases made in the pottery could be finished in the new plant and turned out as a finished product.

During the early part of the year 1948 a Labor Board election was conducted at the plant and the United Brick and Clay Workers of America was selected as the representative of the employees. During negotiations between the employer and a committee of the Union, an engagement was made for a meeting of both sides with a conciliator in the employ of the United States Government. The meeting was to be held on Wednesday in the offices of the company's attorney. The conciliator found it necessary to postpone the meeting until the following Friday. He attempted to notify all the parties but for some reason his notice of postponement failed to reach Earl Bellew, an officer of the Union. Mr. Bellew appeared on Wednesday with the Union committee at the place fixed for the meeting with the conciliator.

When he learned that the meeting had been postponed, he discussed the situation with his committee and determined to call a strike. The strike began that afternoon. The plant continued to operate with employees who remained at work. The familiar pattern of picketing, name-calling, violence and other disorders followed, and the picket line was shortly thereafter extended from the entrances to the operating plant so as to include all of the property on which the construction work was in progress. There was no dispute

involving the contractors during the construction work or their employees. Nevertheless, the picket line forced a discontinuance of the construction work.

Deena Products v. United Brick & Clay Workers, *et al.*, 195 F. 2d 612.

Two actions were filed against United Brick and Clay Workers, one by Deena Products Company, an Illinois corporation, which we will refer to as the parent company, and the other by Deena Artware, a subsidiary corporation. The Court directed a verdict against Deena Products Company, holding in substance that there *was no contractual relation between Deena Products Company and Deena Artware* which would enable the parent company to recover damages for the wrongful secondary boycott which stopped the construction of the plant by its subsidiary. On appeal the District Court was affirmed. The Court of Appeals stated in its opinion that the right of the parent company to recover depended entirely upon contractual relations with the subsidiary and such contractual relations did not exist. 195 F. 2d 613.

The record in the above case was brought up to this Court which denied certiorari (344 U. S. 822, 73 S. Ct. 21), No. 117 in the October term, 1952. References to pages of the Transcript, and particularly to the extensive examination and cross-examination of George Weiner and independent auditor Harry Appleman, are found in our motion and answer in the Court below (R., p. 28). The extensive examination of these witnesses largely deals with the relationship between the

parent company, Deena Products, herein called Products; and Deena Artware, herein called Artware, and the disposition of construction material which, on account of a secondary boycott, could not be used by Artware and was used in a new building in the nearby town of Arlington, Kentucky. The testimony also shows that material used at Arlington was charged to Deena of Arlington, herein called Arlington, and not to Artware.

Income tax returns were produced on that trial, as the record shows, and they show that Products was not permitted to deduct on its tax return the loss on account of construction costs. The loss was permitted for Artware. Thus, the Bureau of Internal Revenue reached the same conclusion arrived at by the District Court and affirmed by the Court of Appeals as to the relationship between the parent and the subsidiary, Artware.

United Brick and Clay Workers v. Deena Artware, 198 F. 2d 637.

In the above case the Court affirmed a judgment in the amount of approximately $30,000.00 in favor of Deena Artware and against the Clay Workers Union and the American Federation of Labor. The judgment was based on a finding that there had been a wrongful secondary boycott which stopped the construction of the plant in Paducah. The first trial resulted in a hung jury. The cross-examination of Weiner and the auditor, Harry Appleman, showed that certain building material and construction plans originally designed

to be used by Artware had actually been used by the new corporation, Arlington, organized after the secondary boycott had made it impossible to continue the construction at Paducah. See amended and substituted complaint (R., p. 85). The judgment obtained on this complaint (R., p. 91), represented the net loss to Artware on account of the construction costs.

The thorough exploration of the relationship between Products and Artware and the development of facts as to the use of and charge for building material which could not be used by Artware and was used by Arlington are available to the Board in the records on appeal in both of the above cases. "Discovery" is not needed and it is not the true purpose of the motions of the Board. Attorneys for the defendants, United Brick & Clay Workers Union and American Federation of Labor, in the secondary boycott case in which judgment was obtained were Messrs. Woll and Thatcher of Washington, D. C., a Mr. Tobin of Washington, John Young Brown and Joseph S. Freeland of Kentucky, and Nathan Duff of New Jersey, also an official of the union. Messrs. Duff and Freeland were also active in assisting the Board in the unfair labor practice case, and it is certain that in its thorough preparation of its numerous motions, the Board has familiarized itself completely with the facts brought out in these records.

The judgment in favor of Deena Artware for damages resulting from the secondary boycott and the order of the Board based upon its conclusion that there was no secondary boycott were both affirmed.

N. L. R. B. v. *Deena Artware*, 198 F. 2d 645, July 30, 1952. The above case is referred to as the first decree.

Deena of Arlington was organized to carry on a business which would suffer or be destroyed if customers could not be supplied with merchandise. It also minimized respondent's loss by using material which had been purchased and delivered to Paducah but which could not be used there on account of the wrongful secondary boycott. The loss was also minimized to some degree by the purchase for $25,000.00 of a small plant of Sippi Products at Wickliffe, Kentucky. This dispersal of operations, one of the things of which the Board complains, was precipitated and made necessary by the wrongful act of the Unions, viz., the secondary boycott of the construction work.

In 1949 Artware executed to Products its written promissory note for approximately $75,000.00. The note and mortgage may be found on pages 172, *et seq.*, of the record in the Deena Products case referred to above (R., p. 21). The execution was duly authorized by action of the board of directors of the respective companies (R., p. 22). When the indebtedness matured five years after the execution of the note and mortgage, Artware conveyed the mortgaged property to Products in satisfaction of the indebtedness. At that time the indebtedness of Artware to Products amounted to approximately $161,000.00. The property conveyed in satisfaction of the indebtedness had been appraised at approximately $85,000.00 (R., p. 29). It will be remembered that this property had originally been purchased in 1946 for $65,000.00. Another appraisal was

made when Industrial Realty Company acquired the property in 1954. The real estate was then appraised at $85,487.50, and the personal property at $5,253.00 (R., p. 23).

N. L. R. B. v. Deena Artware, 207 F. 2d 798.

In this case the Board attempted to restrain the respondent from assigning funds to the parent corporation in partial satisfaction of its indebtedness to that corporation. The assignment referred to was as follows:

"ASSIGNMENT.

"WHEREAS, Deena Artware, Inc., is indebted to Deena Products Company in sums largely in excess of any amounts for which it has recovered judgment against United Brick & Clay Workers of America and the American Federation of Labor.

"AND WHEREAS, a mortgage heretofore executed by Deena Artware, Inc., may be insufficient to secure the amount of its indebtedness to Deena Products Company,

"AND WHEREAS, Deena Artware, Inc., has assigned out of the said judgment to Wheeler & Marshall, Attorneys, the sum of Fifteen Thousand Dollars ($15,000.00),

"NOW, THEREFORE, IN CONSIDERATION OF THE FOREGOING, and in order to secure Deena Products Company, on account of the indebtedness of Deena Artware, Inc., to it, Deena Artware hereby assigns to Deena Products Company any balance due it out of said judgment after the payment of the amount assigned to Wheeler & Marshall.

"IN TESTIMONY WHEREOF, witness the hand of said Deena Artware, Inc., by its duly authorized officers, this 16th day of December, 1952.

DEENA ARTWARE, INC.
By (s) Geo H. Weiner
President

ATTEST:
(s) J. C. Jarett
Secretary"

The Board not only sought to enjoin the assignment *but asked for an order to show cause why Dee Artware*, Deena Products Company and the President of both corporations, George H. Weiner, should not be required to produce books and records in order that the Board might determine whether Artware was being operated for the purpose of rendering it without funds to pay back-pay obligations. The amount of back-pay obligations had not then been determined. The Court was of the opinion that it should not take jurisdiction of the matter. It pointed out that the claims were not lien claims and that if there was an improper transfer of assets from the subsidiary to the parent corporations, *remedies were available to the Board in the District Court independent of any action by the Court of Appeals.* The Court pointed out that the questions involved in a controversy between creditors would be both factual and legal and that the *Board should avail itself of the facilities of a trial court.* Many cases were cited supporting the Court's ruling, page 801. It was stated in that opinion that a statement of probable financial inability to pay claims did not amount

to contempt, page 802, and further that the contempt power of the Court should be exercised with caution, page 802. Affidavits and counter-affidavits were filed, bearing to some extent on the question submitted here. For example, the affidavit of Bernice Kessler, secretary of Deena Artware, showed by certified copies that the board of directors had authorized the execution of the notes and mortgages to Deena Products Company. The affidavit of the independent auditor, Appleman, indicated that the indebtedness of Artware to Products at that time was approximately $161,000.00.

There has never been any attack on the execution of the mortgages or the conveyance of real and personal property in satisfaction of the indebtedness secured by the mortgage. In all of the arguments beginning in the 1953 case dealing with the assignment the Court below suggested that the Board might use the facilities of a trial court if it felt that one creditor was fraudulently obtaining an advantage over another. *N. L. R. B.* v. *Deena Artware*, 207 F. 2d 799, see page 801; *N. L. R. B.* v. *Deena Artware*, 251 F. 2d 183, see page 186. The conveyance more than a year before the final decree of Artware's property in satisfaction of mortgages executed more than six years before the final decree could not be complained of as "siphoning off" assets.

The questions presented in the assignment case were almost identical with those which have been repeatedly presented in the subsequent four cases. (We refer to them as separate cases, though actually they are all No. 11,156.) The validity of the assignment was liti-

gated and no review of the 1953 ruling was sought by the Board. Surely the Board is not now in a position to seek a review of a decision made in that case six years ago and more than two years before the final decree. This illustrates the soundness of the reasoning on which the last opinion of the Court below is based, namely, that there can be no contempt of a decree until a decree is definite and certain.

N. L. R. B. v. Deena Artware, 228 F. 2d 871.

This was the proceeding to enforce the Board's final award amounting to approximately $300,000.00 in favor of certain former employees of the respondent. The questions as to the Board's findings need not be outlined here. The Court found that the findings were supported by substantial evidence. The decree was entered December 16, 1955.

N. L. R. B. v. Deena Artware, 251 F. 2d 183.

This was a proceeding instituted by the Board to obtain an order requiring the respondent Deena Artware and the several affiliated corporations to produce their books and records, permit the Board to inspect, copy and photograph them, and to require present or former officers of the respondent and affiliated corporations to give depositions. The facts as to the relationship between the corporations, the strike and the litigation arising out of it were reviewed in the motion and response. The Court was urged to treat the motion as a proceeding for contempt. The Court referred

to its ruling in the 1953 assignment case, stating that the issues raised were not materially different from those raised in the 1953 case, practically the only difference being that the amount of back pay claims had in the meantime been liquidated. *It was pointed out that it was not customary for an appellate court to retain jurisdiction in order to collect its judgment.*

It will be noted that all of the above cases except the first two referred to are in this action, No. 11,156, and we think the records and affidavits are material and can be considered by the Court below.

N. L. R. B. v. Deena Artware, 261 F. 2d 503, Dec. 13, 1958 (R., p. 74).

The opinion of the Court below by Judge Miller, who had this controversy before him for the seventh time and who had written all of the opinions except two which were *per curiam*, sets out some history of the litigation and refers to previous opinions, stating that they "give in detail the factual background and history of the litigation." In this thorough opinion a unanimous Court held that it was not contempt of court to refuse to obey the Board's order before it was judicially confirmed and that the enforcement decision of July 30, 1952, which fixed no amount of back pay due, was not sufficiently definite to serve as a basis of contempt proceedings. Incidentally, it was suggested in the earlier opinions that the amount of back pay might be as much as $100,000.00. Actually, it amounted to approximately $300,000.00. Finding that all of the transactions relied upon by the Board as a basis for

contempt proceedings occurred prior to December 16, 1955, the date of the final decree, the Court denied the Board's motion.

SUMMARY OF ARGUMENT.

1. No respondent can be in contempt of a decree which does not specify definitely what he is to do. The decree of July 30, 1952 merely established liability for an unliquidated amount, if indeed for any amount, and did not fix any specific sums due.

2. No respondent can be in contempt of a definitive decree ordering him to pay money if, prior to such a decree, he becomes insolvent. The same is true even though his insolvency was caused by alleged preferential conveyances *prior* to the decree.

3. The allegations which seek to impose liability in contempt upon the theory that some of the respondents are alter egos, officers, agents, successors and assigns of Artware are not legally sufficient within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure.

4. The Board, as agent for back-pay claimants, may seek to reach assets allegedly conveyed preferentially by Artware, but contempt proceedings cannot be maintained in such circumstances. The proper procedure is a creditor's action to set aside conveyances and reach debtor's assets.

ARGUMENT.

I.

(a) No Respondent Is in Contempt of the July 30, 1952 Decree Because It Did Not Fix Any Definite Amount To Be Paid.

(b) No Respondent Is in Contempt of the December 16, 1955 Decree, Even If Artware's Insolvency Resulted From Alleged Preferential Transfers of Its Assets to Other Respondents Because the Transfers Occurred *Prior* to That Decree.

All the transactions alleged by the Board to constitute contempt antedated the decree of December 16, 1955, which, for the first time, liquidated the back pay claims, and consequently, was the only decree anyone could have disobeyed contumaciously. Nothing subsequent to that decree, however, was alleged by the Board and the court below properly dismissed its contempt petition and motions for discovery, inspection and depositions. The court below cited *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949, 952 (C.A. 2), where Judge Learned Hand held that,

> "until such a hearing has been had and a decision rendered fixing the amount, the employer cannot be guilty of contempt, because it is cardinal in that subject that no one shall be punished for the disobedience of an order which does not definitely prescribe what he is to do. *McFarland* v. *United States*, 7 Cir., 295 F. 648, 650; In re *Olson*, 2 Cir., 79 F. 2d 253; *National Labor Relations Board* v.

Bell Oil & Gas Co., 5 Cir., 99 F. 2d 56; *Berry* v. *Midtown Service Corp.*, 2 Cir., 104 F. 2d 107, 111, 122 A. L. R. 1341. So far as an enforcement order directs back pay to discharged employees it cannot therefore be interpreted as peremptory in the sense that will support a proceeding to punish for contempt. *Pro tanto* it is interlocutory, though it is final as to any of its other provisions that require no further definition. We cannot delegate to the Board power to fill in the amount of the back pay as a merely ministerial duty."

The Board now contends that the respondents, nevertheless, must be found in contempt on its allegations that Artware's assets were diverted by the parent corporation to itself to avoid payment of the sums ultimately found due by the decree of December 16, 1955. It argues that the July 30, 1952 decree, although it contained no order to pay any definite sums to any named individuals and although no ultimate liability might ever have been found, nevertheless created "a fixed and immediate obligation" upon Artware and "others identified with it" to "make payment of whatever specific sums may ultimately be found due". (Br., pp. 14, 20). In support of its view the Board refers to cases in which respondents have sought to avoid compliance with court decrees by fraudulent conveyances, and by destroying or diverting identifiable property or funds which were the subject matter of the litigation. However, in the cases urged by the Board to support the contention that fraudulent conveyances designed for the purpose of escaping obligations under court decrees constituted contempt, the decrees found to have

been violated were definite and certain, and precisely fixed the obligation of the respondent and were wholly unlike the July 30, 1952 decree here. The cases involving destruction and diversion of property and funds, *as constituting contempt, even in the absence of an order,* rest upon the premise that the property or the fund was clearly identifiable as the subject matter of the pending litigation, such as a parcel of real estate described by deed, identified personal property, a fixed sum of money, or were in the custody of the court. Here the decree of July 30, 1952 described no such identifiable or fixed and certain subject matter, and no such property or fund was in the custody of the court below. Thus the fact that no final order had been issued in those cases is not decisive here. On the contrary, the contempt lay in those cases in the wilful dissipation or destruction of the clearly identified subject matter of the requested injunction. The cases relied upon by the Board (Br., pp. 21, 22 and footnote 1), consequently, are wholly inapposite.

In *Berry* v. *Midtown Service Corp.*, 104 F. 2d 107, cert. dismissed (by stipulation of counsel), 308 U. S. 629, a case cited in the opinion below which we believe is particularly pertinent here, the Court of Appeals for the Second Circuit held that a fraudulent conveyance prior to the entry of judgment was not a contempt of the judgment and observed that no one had ever claimed it to be. That court went on to state that issues arising from allegations of fraudulent conveyance prior to the entry of judgment were properly triable in a plenary suit to set aside such conveyances and to

reach assets. It should be noted that the court below pointed out to the Board that its allegations in the instant matter were triable by such plenary procedure. The Board, however, has not heeded that instruction.

In reality, the Board appears here as collection agent for the back pay claimants. It seeks to invoke the contempt jurisdiction of the court below to aid its collection of debts due its principals. This Court in *Nathanson* v. *National Labor Relations Board*, 344 U. S. 25, where the Board sought priority, as debts due the United States, for back pay claims in a bankruptcy proceeding, so described the status of the Board, and further characterized back pay claims as claims in contract against the debtor's estate. This Court's decision in the *Nathanson* case is a square holding that the public policy of the National Labor Relations Act does not require exceptional and extraordinary remedies when the Board seeks to collect back pay claims but that, on the contrary, that public policy is effectuated by recognizing the claims as debts in contract. It follows that the Board must pursue traditional procedures and remedies established to collect such claims. This would appear all the more so when, as here, the Board is seeking the extreme sanction of contempt in a case where the court below found that its decree had not been disobeyed by any respondent. In view of this Court's decision in the *Nathanson* case, the opinion of the court in the *Berry* case is a complete answer to the Board in this respect.

It aids nothing to the resolution of the issues in the present case to argue, as the Board does, that the "full

sanction" of the Act must be directed to carry out the court's decree. No one will dispute, that, in appropriate circumstances, proper effectuation of the policies of the Act may require the use of the contempt process. Before that extraordinary jurisdiction can be invoked, however, a Court of Appeals must find that its decree has been disobeyed. The discretion of the Court of Appeals is not abused when, in the absence of a finding that its decree has been violated, it denies access to its contempt jurisdiction. Nothing in *National Labor Relations Board* v. *Warren Co.*, 350 U. S. 107, contradicts that basic principle. The order in the *Warren* case was clear and definitive—it commanded the employer to bargain with a certified union. The employer disobeyed the decree and refused to bargain with the union, arguing that the certified union had lost its majority. The court below there excused the employer. This Court held that contempt should have been ordered because the employer disobeyed a specific command to bargain with the certified union and that its excuse had long been held no basis for avoiding the duty to bargain in the circumstances. Nor does the decision of this Court in *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187, support the result urged by the Board. In that case, again, the conduct found contumacious by the sole respondent and not a third party *followed* the entry of a *definitive* decree which contained a fixed and specific formula for payment of overtime wages due under the Fair Labor Standards Act. This Court's observations in that case concerning the availability of other tribunals as constituting no suf-

stitute for contempt procedures consequently were not made in a factual context comparable to that of the instant case where the acts alleged as contumacious occurred *prior* to the issuance of a definitive decree.

It is difficult to understand why the enforcement procedures of the Act are threatened, as the Board claims, by the decision below. Certainly the Board, as administrator of the Act, must pursue its remedy by appropriate procedures and in proper tribunals where, if properly sufficient allegations are proved, its claims may be properly adjudicated. This would appear especially so when, as here, the court below has pointed out to the Board the manner in which it should proceed.

II.

The Allegations Concerning the Relationship of the Other Respondents to Artware (the Only Party to the Proceeding) Do Not Meet the Test of Legal Sufficiency Within the Meaning of Rule 65(d) of the Federal Rules of Civil Procedure as to Warrant Liability in Contempt.

We believe that a fair appraisal of the Board's factual allegations will not support the conclusion that any respondents can be in contempt of any decree within the scope of Rule 65(d). Briefly, those allegations claim that an integrated enterprise existed which was owned and controlled by respondent Weiner and the parent corporation, Products, and that the assets of the subsidiary, respondent Artware, were "siphoned off" by Weiner and Products to escape payment of back pay claims. Upon analysis, the allegations fall into

two separate categories, one dealing with the corporate structure and relationship of the respondents and the other with the transactions which resulted in Artware's insolvency prior to the December 16, 1955 decree, and which, except for the actual conveyance of Artware's assets, occurred long prior to the July 30, 1952 decree.[1] Those dealing with the relationship of the corporate respondents demonstrate a common method of conducting corporate business. Parent stock ownership and parent control of subsidiaries is usual, not extraordinary. It is basic that they do not expose separate corporate entities to liability for the obligations of each other. Judge Learned Hand observed in *Kingston Dry Dock Co.* v. *Lake Champlain Transp. Co.*, 31 F. 2d 265 at 267 that,

> "So long as the law allows associated groups to maintain an independent entity, its sanction is not so easily evaded; the persons dealing with either [parent or subsidiary] do so upon the faith of the undertaking of that one which they may select."

Stripped of characterizations and inferences, the recitations in the Board's petition, summarized in its brief (Br., pp. 7-9), disclose the establishment of a subsidiary, Deena Artware, by its parent, Deena Products, to manufacture urns for lamp bases, that Products owned all the stock of Artware, that Products controlled the operations of Artware, that Products charged Artware for amounts advanced by Products

[1]The 5 year note and mortgage for $75,459.65 were executed on October 31, 1949, almost three years before the unliquidated decree of June 30, 1952 and a little over six years prior to the operative decree for contempt purposes, the December 16, 1955 decree.

for construction of a new plant to utilize Artware's production, that the new plan was abandoned and that Products cancelled the indebtedness of Artware by causing Artware to convey its assets to Products to satisfy the indebtedness. These allegations disclosed no sinister significance except as they are embellished by assertions of bad faith by the Board. Fair appraisal of the facts alleged show the history of an attempt to conduct an operation of mutual interest to the subsidiary and the parent, an attempt to make it successful by the construction of an adjoining plant, a failure to accomplish this objective, and a proper charge by the parent to the subsidiary for costs involved in the venture. Such allegations are no basis for concluding that the basic principle of corporate immunity referred to by Judge Hand should be disregarded.

That the policy of preserving the principle of corporate immunity in such circumstances is not lightly treated is demonstrated by the same court of appeals which rejected a Labor Board request for enforcement of its order against a parent corporation as successor in the absence of a *finding* that the parent so used its position as to wrong someone involved in the proceeding. In *National Labor Relations Board* v. *Timken Silent Automatic Co.*, 114 F. 2d 449, the court found insufficient "ground for disregarding the corporate existence of the two [parent and subsidiary] facts which showed a wholly owned subsidiary whose labor policies were dictated by the parent which controlled and dominated its subsidiary's affairs, conveyed all its subsidiary's assets to itself and assumed all the sub-

sidiary's obligations with notice of the proceedings before the Board but before any decree of the court. What the court found lacking, however, was a *factual* showing from which it might be said that "control by the parent—wronged or defrauded anyone with whom these proceedings are concerned and without proof of that sort of dominance the parent stockholder is not to be treated as one with the subsidiary corporation. *Finley* v. *Union Joint Stock Land Bank*, 281 Mich. 214, 274 N. W. 768; *Gledhill* v. *Fisher & Co.*, 272 Mich. 353, 262 N. W. 371, 102 A. L. R. 1042; *Kingston Dry Dock Co.* v. *Lake Champlain Transportation Co.*, 2 Cir., 31 F. 2d 265."

Although in the present case we take, as true, for the purpose of testing the legal sufficiency of the Board's petition, its factual allegations, we are not bound by its characterizations and inferences. The allegations charging bad faith or fraud in connection with the transactions between respondents prior to the decree of December 16, 1955 are conclusionary and not factual and would be demurrable. No facts are alleged showing that the value of the property received by Products in satisfaction of Artware's indebtedness exceeded that indebtedness. The Board merely has recited certain innocuous facts and attached labels of its preference to them. No rule of construction will sustain a pleading which depends, for its sufficiency in law, upon conclusions of the pleader. If, therefore, the allegations of bad faith are disregarded, and we believe they must be because they are conclusions, the the essential element—use of the parent's position t

wrong someone—is missing here, and no basis exists for infringing upon the separate and independent corporate immunities of these respondents.

Moreover, in *National Labor Relations Board* v. *Blackstone Mfg. Co.*, 123 F. 2d 633, Judge Learned Hand stated, in an opinion particularly opposite here that,

> "In allowing these words [successors and assigns] to stand we wish to make it clear however, that we do not hold that a 'successor' or an 'assign' will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order forbids."

The court there was referring to the principle of the common law embodied in Rule 65(d) of the Federal Rules of Civil Procedure, which we believe this Court recognized in its decision in *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9. Thus, if respondent corporation Artware is not in contempt of any decree because of its inability to pay, even if caused by alleged preferential conveyance of its assets *prior* to the December 16, 1955 decree, then the alleged successors cannot be in contempt of any decree, because they did not participate in *any* disobedience of *any* order of the Court. Nor is this conclusion to be avoided, as the Board chooses, by remarking on alleged differences in the relationship of the respondents before and after that decree (Br., p. 39, footnote 7). The plain fact is that because there was

no contempt of any decree by Artware, the respondent against whom the Board chose to proceed, there was nothing for the alleged successors to participate in disobeying. Clearly, this is the reason the court below dismissed the Board's petition and motions as against *all* respondents.

This Court in *Regal Knitwear Company* v. *National Labor Relations Board*, 324 U. S. 9, held that liability in contempt as a successor or an assign would depend upon a concrete showing, after judicial hearing, that the relationship of the parties was such as to bring them within the meaning and scope of Rule 65(d) of the Federal Rules of Civil Procedure. That rule imposes liability in contempt only on the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. The scope of the rule is defined in the quotation from Judge Hand's decision in the *Blackstone* case and provides the test of liability in the instant matter.[2]

The relationship of the parties here, taking again as true only the Board's *factual* allegations, demonstrates, as we have shown above, a corporate structure and transactions by its constituent entities neither

---

Weiner and the other respondents cannot be held in contempt of any decree as officer, agent, servant or employee of Artware within the meaning of the rule if Artware is not in contempt. It should be noted that, alternately, the Board seeks to impose liability upon Weiner and the respondents other than Artware upon the basis of the last clause of the rule, as "persons in active concert or participation with them [the actual parties] who receive actual notice of the order . . ."

wronging nor defrauding anyone involved in these proceedings and no participation by the parent and other affiliates with Artware in disobedience of any decree. Consequently, since liability in contempt as a successor or an assign under Rule 65(d) of the Federal Rules of Civil Procedure must depend upon either a showing of dominance or control utilized by the parent in its dealings with the subsidiary *to wrong or defraud* someone involved in the proceeding, or participation by the parent in disobedience of the decree by the subsidiary, there nowhere appears in the *factual* allegations of the Board petition any basis for such liability. No hearing is necessary to establish any concrete set of facts in the context of the requirements of Rule 65(d) because the factual allegations of the Board, if proved, would not sustain a finding of liability in contempt as regards any respondent.

It should be noted that the Board's position in insisting on contempt proceedings here has the necessary effect of creating the distinct possibility that a gross inequity may be perpetrated upon these respondents. In proceeding by contempt, the Board seeks to impose a liability upon all respondents of $300,000 (the sum fixed against Artware only in the supplemental decree of December 16, 1955). The Board's allegations claim a transfer of assets by Artware to the parent of $105,000. The Board asks that the parent be held liable for three times the amount it allegedly received from the subsidiary. However, it is basic that one who receives property in fraud of the grantor's creditors is liable only for what he receives from the grantor.

See, *Hamilton National Bank v. Halsted*, 31 N. E. 900, 134 N. Y. 520; and see 37 *C. J. S.*, page 1115, note 69. We believe that this possibility demonstrates, in a highly practical manner, that the proper procedure which the Board must follow to resolve its claims is by creditor's suit to reach assets in whatever tribunal is appropriate for that purpose if obvious injustice is to be avoided.

We have adverted to the instructions of the court below to the Board that it take its complaint to a tribunal in which the customary procedures for trial of creditors' suits are available. The Board has advanced no valid reason why it failed to attack the transactions complained of.

CONCLUSION.

In the light of the foregoing we submit that the judgment of the court below be affirmed.

JAMES G. WHEELER,
C of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky,

MERVIN N. BACHMAN,
C of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois.

Attorneys for Respondent.

THOMAS J. MARSHALL, JR.,
C of WHEELER & MARSHALL,
901-6 Citizens Bank & Tr. Bldg.,
Paducah, Kentucky.

SIDNEY R. ZATZ,
C of ARVEY, HODES & MANTYNBAND,
One North LaSalle Street,
Chicago, Illinois.

Of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1959

National Labor Relations Board, Petitioner, v. Deena Artware, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 23, 1960.]

Mr. Justice Douglas delivered the opinion of the Court.

This litigation has been long and drawn out and the present case is merely a small segment of it. In 1949 petitioner found that respondent Deena Artware, Inc. (Artware), had violated the National Labor Relations Act, 61 Stat. 136, 29 U. S. C. § 158 (a), by discharging and refusing to reinstate 66 employees who had engaged in a strike (86 N. L. R. B. 732, 95 N. L. R. B. 9); and it ordered Artware "and its officers, agents, successors, and assigns" to offer reinstatement to those employees and to make them whole for any loss of pay suffered by them as a result of the discriminating action. The Court of Appeals in 1952 affirmed the Board's decision with respect to 62 of the 66 employees and entered a decree enforcing the Board's order, 198 F. 2d 645, remanding the case to the Board to determine the amounts due the individual employees. In 1953 Artware offered reinstatement to all of these employees but shortly closed its plant (which was located in Kentucky), never resumed operations, and never paid any back pay to the employees in question.

It appears that Weiner, one of the respondents, created a series of corporations at the top of which was Deena Products, Inc., an Illinois corporation. Beneath it were a group of subsidiaries—formed under Kentucky law—Artware, Deena of Arlington, Inc., Sippi Products Co.,

Inc., and Industrial Realty Co., Inc.—all of whose shares, except for qualifying shares, were owned by Products. Weiner owned all the shares of Products, except for qualifying shares; and all the officers and directors of Products and the several subsidiaries were Weiner, his wife, his son, and his secretary. Weiner was president and treasurer of Products and of each of the subsidiaries, including Artware.

Artware in 1949 gave Products a promissory note secured by a mortgage on Artware's property allegedly for advances made. In 1952 Artware made an assignment to Products in partial satisfaction of its indebtedness. In 1953 the Board applied to the Court of Appeals for an order restraining that assignment. It also asked for an order of discovery, alleging that the affairs of Products and Artware were being conducted in such a way as to dissipate Artware's assets and to avoid making the back wage payments. The court denied these motions, holding that, until the amount of back pay was liquidated and payment of the fixed sum refused, there was no warrant for granting that relief (207 F. 2d 798), the court stating that if upon liquidation of Artware "any financial inability" on its part to pay the awards was shown to be "the result of improper actions on its part in the meantime, appropriate contempt action can then be taken." *Id.*, at 802.

At that time, the Board had not issued an order determining the specific amounts of back pay owed the individual employees. In 1955—nearly two years later—it made that determination and entered an order, directing payment of back pay totaling about $300,000; and the Court of Appeals ordered Artware, "its officers, agents, successors, and assigns" to pay that amount to specified employees. 228 F. 2d 871. That was on December 16, 1955.

In 1957 the Board moved the Court of Appeals for discovery, inspection, and depositions, naming Artware, Weiner, Products, and the other subsidiaries of Products. It alleged that Weiner had caused the assets of Artware to be siphoned off through the other corporations under his control for the purpose of evading the back pay obligation. The Court of Appeals denied the motion, 251 F. 2d 183, holding that a contempt proceeding, rather than discovery, was the proper procedure.

On August 20, 1958, the Board petitioned the Court of Appeals to hold Artware, Weiner, Products, and the other subsidiaries in civil contempt for failure to pay the amounts due employees under the back pay order. On October 11, 1958, the Board renewed its motion for discovery, inspection, and the taking of depositions from Artware, the affiliated corporations, and Weiner and other officers of these corporations.

In its petition the Board made charges of dealings between these corporations and between them and Weiner occurring from 1949 to 1955 which, it maintained, showed both (1) fraud and wrong-doing for the purpose of frustrating the back pay order and (2) the operation of these various corporations "as a single enterprise," each of the corporations performing "a particular function, as a department or division of the one enterprise in the manufacture, sale, and distribution of the common product." The allegations (which are summarized in the opinion below, 261 F. 2d 503, 506–507) need not be repeated here, as the Court of Appeals merely held that, although the enforcement order was entered July 30, 1952, it was not made specific as to amounts owed until December 16, 1955. It, therefore, concluded that prior to the latter date, the decree was "not sufficiently definite and mandatory to serve as the basis for contempt proceedings." *Id.*, at 510. It, therefore, dismissed the Board's petition for

adjudication in civil contempt. It also denied the Board's motion for discovery, inspection, and depositions. 261 F. 2d 503, 510. The case is here on a petition for certiorari, 359 U. S. 983, which we granted in order to consider the validity of the action of the Court of Appeals in dismissing the petition insofar as it charged the existence of "a single enterprise."

The Court of Appeals dismissed the petition without considering the second group of allegations made by the Board *viz.* that these various corporations were in fact "a single enterprise." And it denied the motion for discovery even as it pertained to that alternative theory of liability. It may have done so because it thought that the issues tendered in the petition related solely to inter-company transactions alleged to be conveyances in fraud of creditors or preferences in favor of some creditors. That seemed to be its preoccupation, as evident by its references to possible causes of action under Kentucky law to set those transactions aside. *Id.*, at 509.

We do not stop to consider what would be a proper formulation of a rule of law governing liability in contempt for frustration of a decree. The Court of Appeals may have considered the transactions and assignments as if they were made between separate and distinct corporations. If they are viewed in that light, we cannot say they are so colorable as to warrant us in reversing the Court of Appeals. But we think the Board is entitled to show that these separate corporations are not what they appear to be, that in truth they are but divisions or departments of a "single enterprise." That is the alternative theory of liability which the Court of Appeals did not consider. We think that the Board is entitled to a hearing on that alternative theory and to discovery in aid of it.

The question whether the corporations under Weiner's ownership were only departments or divisions in one single enterprise is in a different family than those that arise under either 13 Eliz. or the modern law of preferences. Whether one corporation is liable for the obligations of an affiliate turns on other considerations. The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception. *See Pullman Car Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 597. Yet as Mr. Justice Cardozo said in *Berkey v. Third Avenue R. Co.*, 244 N. Y. 84, 95, "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where the control is less than this, we are remitted to the tests of honesty and justice." That is not a complete catalogue. The several companies may be represented as one.[1] Apart from that is the question whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities. One company may in fact be operated as a division of another;[2] one may be only a shell, inadequately financed;[3] the affairs of the group may be so intermingled that no distinct corporate lines are main-

[1] *See Platt v. Bradner Co.*, 131 Wash. 573. *Cf. American Nat. Bank v. National Wall Paper Co.*, 77 F. 85, 91.

[2] *See Ezard Co. v. Maryland*, 216 F. 827, 829; *Portsmouth Cotton Oil Corp. v. Fourth Nat. Bank*, 280 F. 879; *Dillard & Collins Co. v. Richmond Cotton Oil Co.*, 140 Tenn. 200, 206; *Costas v. Manila Electric Co.*, 24 F. 2d 383, 384–385. *Cf. United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516, 529; *Chicago, M. & St. P. R. Co. v. Minneapolis Civic Assn.*, 247 U. S. 490, 500–502; *Erickson v. Minnesota & Ontario Power Co.*, 134 Minn. 209, 213–215.

[3] *See Lackenbach S. S. Co. v. W. R. Grace & Co.*, 267 F. 676, 681; *Oriental Investment Co. v. Barclay*, 64 S. W. 80, 86–87. For discussion of the situation where a company is "deliberately kept judgment-proof" see *Weisser v. Mursam Shoe Corp.*, 127 F. 2d 344, 346.

tained.' These are some, though by no means all, of the relevant considerations, as the authorities recognize. See Lattin on Corporations (1959) §§ 13, 14; Stevens on Corporations (1949) § 17; Berle, The Theory of Enterprise Entity, 47 Col. L. Rev. 343.

We do not intimate an opinion on the merits of this alternative theory of liability. The authorities we have cited merely indicate the range of inquiry which the petition of the Board presented. Discovery is useful in determining what the facts are. It is, indeed, necessary to determine whether the decree of the court enforcing the Board's order should run to any of the affiliated corporations or their stockholders. When the facts are resolved it will be time enough to consider what further enforcing decree, if any, would be appropriate.

The petition should be reinstated insofar as it charges the existence of "a single enterprise" and the motion for discovery should be granted so that the Board will have an opportunity to prove those allegations.

Reversed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

---

[1] *See Fla. Water & Gas Dist.*, 252 F. 35, 38; *Wichita Falls & S. R. Co. v. Pendleton*, 53 Okla. 463, 502, 505; *Cf. Lehigh Valley R. Co.*, 220 U. S. 257, 272, 274.

[2] *Cf. Texas Sulphur Co. v. Freeport Texas Co.*, 251 F. 962; *Harlan Public Service Co. v. Eastern Coals Co.*, 254 Ky. 143.

[3] *Cf. Reid Knitting Co. v. Labor Board*, 324 U. S. [illegible]

SUPREME COURT OF THE UNITED STATES

No. 46. October Term, 1959

National Labor Relations Board, Petitioner, v. Deena Artware, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 23, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Harlan joins, concurring in reversal on the grounds hereinafter stated.

Due regard for the controlling facts in this case will have their legal significance. This requires that the facts and the procedural setting in which they are to be considered be stated with particularity.

The respondents are an individual and several corporations. The individual respondent, one Weiner, is the sole stockholder, except for qualifying shares, of Deena Products (Products), an Illinois corporation engaged in the manufacture and sale of lamps. The remaining respondents are wholly owned subsidiaries of Products. They are Deena Artware (Artware), a now defunct Kentucky corporation which formerly engaged in the manufacture of china urns for use as lamp bases; Deena of Arlington, another Kentucky corporation, engaged in the production of shades and the assembly of lamps; Suppi Products Company (Suppi), a Kentucky corporation engaged, as was Artware formerly, in the manufacture of china urns, for use as lamp bases; and Industrial Realty Company (Industrial), a Kentucky corporation organized to hold title to the physical assets formerly held by Artware. Weiner has at all relevant times completely controlled Products, which in turn has similarly dominated all of the respondent subsidiaries. Weiner served as President,

Treasurer[1] and a director of all of the corporations; his wife, son and successive secretaries as the other directors.

Artware was organized by Products in 1946, and shortly thereafter acquired a factory for the production of lamp bases at Paducah, Kentucky. In 1947 construction was undertaken, allegedly by Products, of a lamp assembly plant adjacent to the Artware plant at Paducah. At about the same time the labor dispute arose which led to the Labor Board orders underlying this proceeding. On October 25, 1949 Artware was found by the Board to have violated § 8 (a) (1), (3) and (5) of the National Labor Relations Act (as amended) and was ordered *inter alia*, to reinstate with back pay sixty-six named employees whose discharge during the dispute was found to have been improper. 86 N. L. R. B. 732, 736. On July 30, 1952, the Court of Appeals for the Sixth Circuit at the Board's petition, granted enforcement of its order 198 F. 2d 645. At about the same time that court also sustained Artware's recovery against the union of a money judgment for injuries it sustained by virtue of a secondary boycott engaged in by the union during the same dispute 198 F. 2d 637.

The Board then petitioned the Court of Appeals for an injunction against payment of a part of the judgment Artware had recovered against the union, alleging that Artware had undertaken to render itself unable to pay any back pay in the amounts which the Board was authorized to fix by virtue of the court's order of July 30, 1952. The Court of Appeals refused the injunction primarily upon the ground that the definite amount of back pay owing under its order had not yet been determined by the Board. The court noted that if, after such determination, it appeared that Artware had acted improperly, the court

[1] The respondents' answer denies that Werner was in fact Treasurer of Artware or the other subsidiaries.

could deal with the matter in contempt proceedings. 207 F. 2d 798.

As a result of the proceedings to fix the amount of back pay, the Board, by an order of April 21, 1955, directed Artware to pay the back pay it owed various employees in specified amounts totalling about $300,000. 112 N. L. R. B. 371. This order was sustained by the Court of Appeals. 228 F. 2d 871. On a showing that Artware was entirely without assets, that it had ceased operations on April 24, 1953, and had, on November 24, 1954, transferred all its assets to Products, purportedly in satisfaction of a mortgage, the Board sought a discovery order in the Court of Appeals to inquire into the disposition of Artware's assets. The Board proceeded on the assumption that discovery would reveal facts requiring payment of Artware's back-pay debt by the companies affiliated with it. Discovery was denied (one judge dissenting). 251 F. 2d 183. The court's ground for denying discovery was, surprisingly enough, that the Board should first test the legal sufficiency of a complaint charging respondents with contempt. The Board thereupon filed this petition alleging contempt of the court's decree of enforcement of July 30, 1952, and renewed its motion for discovery.

The Board's petition charged that pursuant to a plan to frustrate the award of back pay against Deena Artware, conceived by Weiner during or shortly after the dispute with the union and carried out by him through exercise of his control of Products and all its subsidiaries, all of the assets of Artware were systematically transferred to Products and its other subsidiaries for the purpose of rendering Artware unable to pay any back-pay order that might thereafter be enforced against it. It alleged that acts in pursuance of that plan occurred after and therefore in contempt of the decree of the Court of Appeals which was entered on July 30, 1952. All of the acts al-

leged in pursuance of the plan occurred before the entry of the 1955 decree affirming the Board's order to pay specific amounts. The Board charged that Weiner and Products prevented Artware from showing any operating profits and thereby accumulating assets in the ordinary course of its business, by causing Artware to lower the price at which it sold urns to Products, so that Artware showed losses while Products made substantial profits, and that Weiner and Products caused Artware to issue notes, secured by mortgages on all of its assets, to Products, for which Artware received nothing in return, in order that Artware's assets could be, as they were, transferred to Products after Artware was adjudicated liable to pay back pay. The Board alleged the following:

1. Early in 1948, after Artware, under Weiner's direction, had committed the unfair labor practices so found by the Board, Products began to treat the new assembly plant construction at Paducah adjacent to Artware's plant as if it had been undertaken by Artware, and not, as was the fact, by itself. Artware therefore recorded the losses resulting from abandonment of that construction in July 1948. Nevertheless, when Products undertook alternative new construction at Arlington for the same purpose it used the construction materials, engineering and architectural plans and services, and other services and materials, which it had already charged to Artware, and did so without paying Artware or crediting it with their value.

2. Products thereafter made further use of its purported shift of the Paducah construction to Deena Artware. About October 31, 1949, a few days after the Board issued its order directing, *inter alia*, that Artware pay back pay, Products and Weiner caused Artware to execute a note to Products in the amount of $75,459.65, payable within five years, and secured by a mortgage on all the real and personal property of Artware, purportedly in return for advances by Products for the construction at Paducah

despite the fact that the construction had been abandoned more than a year before, and had been undertaken not by Artware, but by Products. A second note, similarly secured, was issued about September 19, 1952, in the amount of $5,797.74. On November 24, 1954, after the Court of Appeals' first enforcement order of July 30, 1952, but before the Board's fixation of the amounts due on April 21, 1955, Weiner and Products caused Artware to transfer to Products all of its assets in satisfaction of these mortgages. In December 1952 Products and Weiner also caused Artware to assign to Products part of the proceeds of the judgment Artware had recovered against the union as additional security for its obligations to Products. In January 1954, $19,320.97 of Artware's recovery was received by Products, the remainder having been assigned to Artware's counsel in payment of attorney's fees.

3. Beginning about March 1949, after the hearing on the Board's complaint against Artware, Products and Weiner caused Artware to lower its prices to Products, causing inflation of Products' profits, and operating losses to Artware.

4. About April 24, 1953, Products and Weiner caused Artware to cease all operations. From that time until November 24, 1954, Products and Sippi used Artware's plant premises, facilities and properties at Paducah, without payment to Artware, and Products obtained from Sippi the supplies it had formerly secured from Artware. On November 24, 1954, Products and Weiner caused Artware to transfer all its assets to Products in satisfaction of its obligations which then, with accrued interest (at 6% payable semi-annually but not theretofore paid), totaled $105,000, leaving, as Artware's sole unsatisfied obligation, the back-pay order. Thereafter Sippi continued to use the Artware facilities, title to which, about May 4, 1955, Products caused to be transferred to the newly created subsidiary, Industrial. About November 17, 1955, Prod-

ucts and Weiner caused Industrial to lease the facili
formally to Sippi; and since December 1, 1955, Sippi
operated the Artware facilities in the same manner a
to the same end as did Artware formerly.

The Court of Appeals, on respondents' motion, d
missed the complaint for failure to state a cause of act
and denied the Board's accompanying motion for d
covery. It held that since its order of July 30, 19
in affirming the Board's determination of liability
back pay which the Board had not yet individualized
not specify the exact monetary amount which Artwa
owed its various employees, it was "not sufficiently d
nite and mandatory" to sustain an adjudication of c
tempt. The basis of this conclusion was not a constr
tion by the court of the special terms of its own decr
This was in terms the order entered by the Board. T
court applied what it believed to be a general princi
of law that an enforcement decree of a Board order det
mining liability for back pay, but leaving for a later sta
determination of the specific amounts due to in
vidual employees, is too indefinite to sustain contem
proceedings.

The respondents urge in support of the decision be
that after the 1952 decree Artware was entitled to a f
ther administrative hearing to determine whether t
conduct of the named employees after their wrong
discharge disentitled them to recover, and that des
the 1952 decree it might therefore ultimately be det
mined that Artware was not in fact obligated to ma
any payment whatever. It follows, the argument r
that since the Board's 1952 order did not purport to ad
dicate a liability free of defenses to make back-pay pa
ments, it could not, for purposes of such payments
considered final. Accordingly, the 1952 decree which
terms enforced it could not embody a final mandate e

cerning the payments disobedience of which would constitute contempt.[2]

The Board concedes that the 1952 decree having been entered before any determination of specific amounts owing, it did not direct present payment to be made, and that respondent Artware could not be held in contempt for failure to make payment before the entry of the 1955 decree. But it urges that the 1952 decree could and did impose an immediate and definite obligation upon Artware not to design and execute a plan for the very purpose of disabling itself from obeying the decree which had definitively adjudicated its obligation to pay whatever would be found to be the dollar-and-cents amount of its theretofore established liability. If the allegations in the petition for contempt are sustained by proof, there can be no doubt that Artware disregarded this obligation not to frustrate the 1952 decree.

The vital question of the legal implications of enforcement of a Board order rendered in an unfair labor practice proceeding directing reinstatement and payment of back pay, was the sole question dealt with in the opinion below. It was the primary issue between the parties here. It is the issue for our decision. The Board's procedure in unfair labor practice cases is first to hold a hearing to determine whether an unfair labor practice was committed, and, if it was, whether it would "effectuate the policies" of the Act for the Board to order reinstatement with back pay of any employees who were discharged. § 10 (c). In such a proceeding the Board does not concern itself with the amount of back pay actually owing. This is excluded from the proceeding in the interest of

[2] The question involved here was not presented for decision in *National Labor Relations Board v. New York Merchandise Co., Inc.*, 234 F. 2d 949. To the extent that the opinion in that case is inconsistent with the principles here announced, it is of course disapproved.

the efficient administration of the Act. The determination of specific liabilities may involve a protracted [illegible] test. An employee who is wrongfully discharged [illegible] for example, not be entitled to back pay because he has to accept other employment. *Phelps-Dodge Corp. v. Labor Board*, 313 U. S. 177, 197–200. Since the [illegible] mination that the discharge was wrongful is subject review, extensive proceedings to determine the [illegible] liability may be rendered superfluous by reversal. [illegible] the determination is sustained and becomes final, [illegible] be expedient for a respondent to reach agreement [illegible] avoid further litigation. The propriety of this statutory two-stage procedure of the Board in these back pay cases is not questioned.

It will not do to hold that because the Board's [illegible] mination of the duty to make back-pay payments does not result in fixed money judgments, no final order with regard to back pay is in fact entered or enforced. The Board is not, as respondents suggest, merely the [illegible] representative of the employees for recovery of [illegible] losses. Its primary function under § 10 (c), with which it makes specific monetary orders for [illegible] employees, is to prevent the conduct defined [illegible] labor practices in § 8. Section 10 (c) provides that if the Board determines that an unfair labor practice has occurred, it may make such remedial orders for [illegible] ment with back pay as will "effectuate the policies" of the Act. We have held that the Board is granted [illegible] cretion over the fashioning of remedial orders [illegible] provision. *Phelps-Dodge Corp. v. Labor Board*, [illegible] at 193–196.

National Licorice Co. v. Labor Board, 309 U. S. 350, [illegible]. We there held simply that a back pay order does not [illegible] owing to the United States and therefore not [illegible] § 64 (a) (5) of the Bankruptcy Act, 11 U. S. C. § 104 (a) (5).

It is plainly within that area of discretion for the Board to order an employer who is found to have violated § 8 by the discriminatory discharge of employees, to refrain from conduct which is solely designed to defeat any remedial back-pay order which may be entered when specific amounts are finally determined. It is equally appropriate for the Court of Appeals, by a decree enforcing the Board's order, to place him at the hazard that if an amount is found to be owing, such conduct subsequent to the decree may be found to be contumacious. The salient fact which brings the Board's remedial power into play under § 10 (c) is its finding that the employer's conduct constituted an unfair labor practice. The separation of that finding from the determination of amounts being a mechanically reasonable method for administering the Act, it is irrelevant that as yet undetermined matters subsequent to the discriminatory discharge may in fact entitle some or all of the employees to receive pay. Cf. *McComb v. Jacksonville Paper Co.*, 336 U. S. 187. Enforcement of such a Board order does not interfere with the ordinary conduct of the respondent's business or subject it unreasonably to the hazard of contempt. For decree is a form of assurance that business will be conducted with reference to business motives, and not with a view to evade the remedies designed to enforce the policies of the Act.

It is further urged however that even if power exists in the Board and the courts to enter and enforce such an order of liability for back pay in amounts to be ascertained the Act itself contained no such direction. But the decree, on its face, is an exercise of the equity power to act in advance to direct a specific course of conduct. To fail to enforce it at least the implied effect of a direction not to act solely for the purpose of defeating it, makes of it a mere lien less than a *lis pendens* and transmutes it

into a mockery. The Board's determinations are not merely administrative analogues of common-law judgments, and they do not purport to be. As here, they uniformly contain a specific direction to take "affirmative action." In enforcing the Board's orders the Courts of Appeals similarly act not merely to review a common-law judgment, but "to effectuate the policies" of the National Labor Relations Act by enforcement orders directing that action be taken to remove the unfair labor practice found to exist. Every affirmative order in equity carries with it the implicit command to refrain from action designed to defeat it. Such an implication may arise from the mere assumption of jurisdiction as to specific property. See *Merrimack River Savings Bank* v. *Clay Center*, 219 U. S. 527, 535–536. Here, although specific property is not involved, the 1952 order was more than an assumption of jurisdiction. It adjudicated a liability to redress the consequences of a discriminatory discharge. Implicit in that adjudication, and the direction to pay in which it was embodied, was the command to the respondent Deena Artware not to conduct its business and transfer all its assets for the sole purpose of evading the specific dollar-and-cents obligations in the offing. In the *Merrimack River Savings Bank* case, *supra*, the Court held that "the willful removal beyond the reach of the Court of the subject matter of the litigation or its destruction pending an appeal from a decree praying, among other things, an injunction to prevent such removal or destruction, and the right shall be determined is, in and of itself, a contempt of the appellate jurisdiction of this Court." 219 U. S., at 535–536. Our case is *a fortiori* governed by that principle. Here the Court of Appeals had already adjudicated that the respondents were subject to a liability for back-pay wages, and the individualization of the amounts flowing from this liability merely awaited the determination by the Board. The assumption that

money would be due to any of the workers is so fanciful as surely not to be made the basis of the legal assumption that although the Court of Appeals had adjudicated the liability of the respondents, no liability would follow. By putting beyond reach the means for satisfying the dollar-and-cents amount of their liability, the respondents certainly frustrated the Court of Appeals' power to effectuate enforcement of the liability which it had already established.

On the Board's allegations there can be no doubt of the liability of some or all of the other respondents in contempt. Weiner, Products and the subsidiaries are alleged to have been active participants in a deliberate scheme to frustrate enforcement of Artware's liability established by the 1952 decree. The alleged "relations and behaviours" of the several respondents are sufficient to bring them within the terms of Rule 65 (d) of the Federal Rules of Civil Procedure. *See Regal Knitwear* v. *Labor Board*, 324 U. S. 9, 14–15.

Accordingly, the petition for contempt should have been sustained, and an appropriate motion for discovery should have been granted. The ground here taken to sustain the petition of course makes it unnecessary to consider the Board's alternative theory that all respondents constitute a "single enterprise" and as such are liable in contempt for failure to pay the specific amounts decreed in 1955. That ground should of course be open for consideration by the Court of Appeals.